(10)

No. 97-300-CFH

CAPITAL CASE

Docketed:
August 18, 1997

Title: Terry Stewart, Director, Arizona Department of Corrections, et al., Petitioners
v.
Ramon Martinez-Villareal

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	May 20 1997	Application (A96-830) to vacate the stay of execution entered by ninth circuit court of appeals, submitted to Justice O'Connor.
	May 20 1997	Application (A96-830) referred to the Court by Justice O'Connor.
	May 20 1997	Application (A96-830) denied by the Court.
	Aug 18 1997	Petition for writ of certiorari filed. (Response due September 17, 1997)
	Sep 17 1997	Brief of respondent Ramon Martinez-Villareal in opposition filed.
	Sep 17 1997	Motion of respondent for leave to proceed in forma pauperis filed.
	Sep 17 1997	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Sep 17 1997	Brief amicus curiae of California filed.
	Sep 23 1997	Reply brief of petitioner Terry Stewart, Director filed.
	Sep 24 1997	DISTRIBUTED. October 10, 1997
	Oct 14 1997	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Oct 14 1997	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Oct 14 1997	Petition GRANTED. SET FOR ARGUMENT February 25, 1998. **********
	Nov 25 1997	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Nov 26 1997	Joint appendix filed.
	Nov 26 1997	Brief amici curiae of California, et al. filed.
	Nov 28 1997	Brief of petitioners Terry Stewart, Director, et al. filed.
	Dec 22 1997	Order extending time to file brief of respondent on the merits until January 9, 1998.
	Dec 22 1997	Brief amicus curiae of American Civil Liberties Union filed.
	Jan 9 1998	Brief of respondent Ramon Martinez-Villareal filed.
	Jan 9 1998	Brief amicus curiae of respondent National Association of Criminal Defense Lawyers filed.
	Jan 12 1998	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Jan 14 1998	CIRCULATED.
	Jan 14 1998	Record filed.
	Jan 20 1998	Record filed.
	Feb 9 1998	Motion of respondent for appointment of counsel filed.
	Feb 9 1998	Reply brief of petitioners Terry L. Stewart, Director, et al. filed.
	Feb 9 1998	Brief amici curiae of United Mexican States, et al. filed.
	Feb 11 1998	DISTRIBUTED. February 27, 1998 (Page 4)

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No. 97-300-CFH

Entry	Date	Proceedings and Orders
	Feb 25 1998	ARGUED.

Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

IN RE TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,
Petitioners.

COMBINED ALTERNATIVE PETITION FOR STATUTORY WRIT OF CERTIORARI OR FOR EXTRAORDINARY WRIT (MANDAMUS, PROHIBITION, OR COMMON LAW WRIT OF CERTIORARI) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ATTORNEY GENERAL

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61 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit held that the 1996 Antiterrorism and Effective Death Penalty Act's limitations on second or successive habeas corpus petitions apply to all habeas proceedings (even "original" Supreme Court petitions), and that enforcing those limitations to preclude consideration of a claim of incompetency for execution would be a violation of the Suspension Clause of the Constitution. To avoid the constitutional problem, the Ninth Circuit construed competency for execution claims as being so unique that they are not subject to the Act's limitations. Each of these conclusions contradicts a direct or implicit holding of *In re Medina*, 109 F.3d 1556 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997). This circuit split raises the following questions:

1. Did Congress intend the Act's limitations on second or successive habeas corpus petitions to apply to all claims and in every court including competency for execution claims and applications for "original" Supreme Court habeas corpus writs?

2. Would applying the Act to prevent consideration of a claim of incompetency for execution, which is raised in a second or successive habeas corpus petition, constitute a violation of the Suspension Clause?

3. By what means can this Court review these issues?

PARTIES TO THE PROCEEDINGS BELOW

This Petition stems from a habeas corpus proceeding in which Petitioners here, Terry L. Stewart (Director of the Arizona Department of Corrections) and Grant Woods (Attorney General of the State of Arizona) were the respondents. That proceeding was initiated by Ramon Martinez-Villareal, a prisoner in the custody of Petitioner Stewart under sentence of death. Relief is sought against an order issued by a panel of judges of the Ninth Circuit Court of Appeals comprised of Judges Edward Leavy, Dorothy W. Nelson, and Thomas G. Nelson.

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OPINION BELOW

The opinion which is the subject of this Petition is not yet published; a copy is attached as Appendix A.

STATEMENT OF JURISDICTION

Petitioners respectfully request issuance of either a statutory writ of certiorari or an extraordinary writ (mandamus, prohibition, or common law writ of certiorari), to enable this Court to review the decision of the United States Court of Appeals for the Ninth Circuit in *Martinez-Villareal v. Stewart*, Nos. 97-80229 and 97-80249. The Ninth Circuit issued its decision on June 23, 1997. Petitioners have timely filed the petition for statutory writ of certiorari within 90 days of that decision. Petitioners contend that this Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. §§ 1254(1) and 1651(a); and Supreme Court Rules 10 and 20.1. Details concerning jurisdiction are addressed in Argument III.

Although the opinion below attempted to avoid the issue, the constitutionality of a portion of the Antiterrorism and Effective Death Penalty Act, 110 Stat. 1214 (codified as amendments to various portions of Chapter 153 of Title 28, United States Code), has definitely been "drawn into question," as a possible violation of the Suspension Clause, Article I, Section 9, Clause 2 of the Constitution. Neither the United States nor any person or agency connected with it were a party to the proceedings below. Therefore, in accordance with Supreme Court Rules 14.1(e)(v) and 29.4(b), notice is hereby given that 28 U.S.C. § 2403(b) may apply, so a copy of this Petition is being served upon the Solicitor General of the United States. To the knowledge of counsel for Petitioners, the court below did not certify to the Attorney General of the United States that the constitutionality of an Act of Congress was drawn into question, as required by 28 U.S.C. § 2403(a).

PROVISIONS INVOLVED

The Suspension Clause, Article I, Section 9, Clause 2, of the Constitution:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

28 U.S.C. § 1651(a):

> The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2244 (as amended in 1996):

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole,

would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

A.R.S. §§ 13-4021 to -24. (*See* Appendix B.)

STATEMENT OF THE CASE

A. General Procedural History.

Ramon Martinez-Villareal was convicted of two murders and sentenced to death, based on two aggravating factors (depravity—he boasted to a traveling companion that he had killed the helpless victims merely to show how "manly" he was—and commission for pecuniary gain) that were not offset by any mitigation. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Beginning in 1986, Martinez-Villareal, represented by various attorneys, litigated several federal habeas corpus petitions and two state post-conviction ("Rule 32") petitions, obtaining stays of execution but no substantive relief in any of them. *Martinez-Villareal v. Arizona*, 493 U.S. 874 (1989) (denying certiorari in second Rule 32 proceeding). In 1990, the district court issued a stay of execution and appointed yet another attorney (Sean Bruner) to represent Martinez-Villareal. In 1991, Bruner suggested, for the first time, that Martinez-Villareal might be mentally incompetent to be executed, so the district court ordered the pending habeas petition dismissed without prejudice, allowing the matter to be litigated in the state courts.

Martinez-Villareal's third state post-conviction relief petition raised 31 claims, but the trial court summarily denied relief, ruling that all but three of the claims were precluded, and that those three raised nothing on which relief could be granted. The competency for execution claim was denied because it should not have been brought in a Rule 32 proceeding at all, but under a separate statute specifically dealing with such claims, A.R.S. §§ 13-4021 to -24. (*See* App. B.) The Arizona Supreme Court denied review and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 506 U.S. 893 (1992).

Bruner then filed an amended habeas corpus petition, arguing most of the claims presented in the Rule 32 proceeding. The district court rejected most of the claims, but ordered that Martinez-Villareal be resentenced, on the basis that he had received ineffective representation during the original sentencing. The

district court left unresolved the issue of Martinez-Villareal's competency to be executed, holding that the claim was not "ripe" for decision—there was then no warrant for his execution and the claim had not been exhausted in the state courts, because no proceeding had ever been brought under the state's competency statute. On appeal, the Ninth Circuit vacated the resentencing order so that Martinez-Villareal was not granted relief of any kind. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). The Ninth Circuit agreed to leave unresolved the competency issue, finding that the issue had been brought to the federal courts "premature[ly]" and specified that its order "to enter judgment denying the petition [was] not intended to affect any later litigation of that question." 80 F.3d at 1307 and 1309 n.1.

In early 1997, the defense finally filed a motion under the statute dealing with competency for execution, requesting a hearing. The Arizona Supreme Court issued an execution warrant for April 16, 1997, but reset the execution to May 21, 1997, to allow Martinez-Villareal more time to prepare for the hearing. Having heard 4 days of testimony, the trial judge concluded that, "Defendant is aware that he is to be punished for the crime of murder and [ ] he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villareal is therefore competent to be executed under the laws of the State of Arizona." On May 16, 1997, the Arizona Supreme Court unanimously agreed that Martinez-Villareal is competent for execution and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 117 S. Ct. 1840 (1997).

B. Development of the Successive Petition/Suspension Clause Issue.

On May 14, 1997, the Federal Public Defender's Office filed a motion requesting that the district court appoint experts to examine and test Martinez-Villareal, in anticipation of filing a "supplemented" habeas petition presenting the competency for execution issue. Petitioners argued that Martinez-Villareal was in effect initiating a successive petition, but that the permission from the court of appeals required by 28 U.S.C. § 2244(b)(3)(A), as amended by the 1996 Antiterrorism and Effective Death Penalty

Act ("Act"), had not been obtained, so that the district court lacked authority to grant the relief requested. On May 16, 1997, the district court denied Martinez-Villareal's request agreeing with Petitioners, and Martinez-Villareal appealed. Although it denied all other relief, the Ninth Circuit ordered that the execution be stayed and that further briefing be submitted concerning whether the Act's limitations on successive petitions, as applied to competency for execution claims, amounted to an unconstitutional suspension of the writ of habeas corpus. Petitioners' application to this Court to vacate the stay was denied. *Stewart v. Martinez-Villareal*, 117 S. Ct. 1840 (1997).

Following oral argument, the Ninth Circuit issued the opinion which is the subject of this Petition. Citing *Herrera v. Collins*, 506 U.S. 390, 406 (1993), the majority opinion pointed out that claims of incompetency for execution, which were first recognized as possessing a constitutional basis in *Ford v. Wainwright*, 477 U.S. 399 (1986), were to be "properly considered in proximity to the execution." (App. A, Slip Op. at 3.) Hence, when Martinez-Villareal first raised his competency claim in federal court, no execution warrant was operative, so the claim had not been addressed because of its prematurity. *Id.* at 3–4. However, the majority believed that, even if there had been an execution warrant pending at the time that Martinez-Villareal had first raised the competency claim in federal court, it still would have been premature, because of this Court's statement in *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1297 (1996), that, "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Thus, because a stay would necessarily have issued to permit federal court consideration of the rest of Martinez-Villareal's claims, and that stay would automatically have rendered the execution non-imminent, the competency claim would still have been premature and not open to consideration in the first habeas proceeding. *Id.*

The situation is further complicated by the passage of the 1996 Act. The majority below recognized that 28 U.S.C. § 2244, as amended, divides successive habeas petitions into just two categories: those raising claims that were presented in a previous

petition, and those raising claims that were not presented in a previous petition. Those in the first category are required, without exception, to be dismissed, while those in the second category will also be dismissed, unless they can pass through the narrow "gateway" exceptions permitted by § 2244(b)(2). *Id.* at 4–5. The first exception, subsection 2244(b)(2)(A), for claims relying on a new rule of constitutional law that was unavailable at the time of the applicant's first habeas petition, does not apply to Martinez-Villareal's competency for execution claim, because such claims have been available since *Ford v. Wainwright* was decided in 1986. The second exception, subsection 2244(b)(2)(B)(i) and (ii), involving newly discovered facts, also is unavailable in a situation like this one, because of the requirement that the new evidence be such as would establish that no reasonable factfinder "would have found the applicant guilty of the underlying offense." This limitation excludes all claims—including competency for execution—that go only to sentencing matters. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997); *In re Medina*, 109 F.3d 1556, 1564–65 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997). "It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed." Slip Op. at 5.

The court of appeals believed that this situation created a "predicament" of constitutional proportions, in that the preclusion of habeas corpus review might amount to a violation of the Suspension Clause, United States Constitution, Article I, Section 9, Clause 2. *Id.* at 6. The majority opinion rejected the possibility of certiorari review by this Court as an adequate solution to the perceived problem because that is part of the direct review process, rather than a mode of plenary collateral review. *Id.* at 5–6 and n.3. It also found no solution in this Court's authority to issue "original" writs of habeas corpus because, contrary to the Eleventh Circuit's conclusion in *Medina*, 109 F.3d at 1564, it concluded that § 2244(b)'s restrictions on successive petitions apply to petitions initiated in this Court, as well as in the lower courts. Slip Op. at 6–8. To avoid the hypothesized "difficult constitutional question," the majority below effectively rewrote the Act, determining that, henceforth, competency for

execution claims will constitute a new category of successive claims, which will be *required* to be brought in multiple habeas petitions, but which, nonetheless, will not be precluded as successive, on the theory that bringing them initially when they are "premature" is the same as not having brought any cognizable prior petition at all. *Id.* at 9–14. Utilizing this transmogrified definition of a "successive" petition, the majority viewed the requirement that a court of appeals grant or deny permission for the filing of a successive petition to be completely inapplicable to competency for execution claims, so it simply transferred Martinez-Villareal's second habeas petition to the district court for further proceedings. *Id.* at 14. The third member of the court below, Judge T.G. Nelson, did not believe that the Suspension Clause issue could be avoided in the manner devised by the majority, and that the Act's restrictions on habeas review as applied to competency for execution claims like Martinez-Villareal's amounted to a violation of the Suspension Clause. However, he concurred in the result, because the transfer of the competency claim to the district court was a satisfactory resolution. *Id.* at 13–14.

REASONS WHY A WRIT SHOULD ISSUE

I

THE ACT'S RESTRICTIONS ON SUCCESSIVE HABEAS CORPUS PETITIONS APPLY TO ALL KINDS OF CLAIMS AND TO ALL COURTS.

The Ninth Circuit concluded that, if 28 U.S.C. § 2244(b)'s restrictions on second or successive habeas petitions (hereafter referred to as "successive petitions") apply to Martinez-Villareal's claim of incompetency for execution, it would constitute a violation of the Suspension Clause, so the court "construed" the Act to avoid the perceived constitutional problem. *Id.* at 3–8. This reconstruction of the statute can be justified only if the Act's restrictions apply to competency for execution claims, and apply to "original" habeas corpus petitions brought in this Court; otherwise, Martinez-Villareal suffers from no "predicament" which needs to be resolved, and the redrafting of the statute is patently erroneous. *Id.* at 3–8. The Ninth Circuit recognized that its view that the restrictions on successive habeas corpus petitions apply to

"original" habeas petitions in this Court directly contradicts the conclusion of the Eleventh Circuit in *In re Medina*, 109 F.3d at 1564. *Id.* at 6–7 and n.4. Hence, there now exists an intercircuit dispute regarding a major issue of statutory interpretation which only this Court can, and plainly should, resolve.

A. FACTORS FAVORING GRANTING OF REVIEW.

Among the "considerations governing review" set forth in Supreme Court Rule 10(a) is the fact that a conflict exists between federal courts of appeals "on the same important matter." This Court has stated that resolution of such conflicts is "[a] principal purpose for which we use our certiorari jurisdiction." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Granting review is especially appropriate where, as here, the conflict is so plain that it is expressly noted by the court below. *See, e.g., United States v. Lorenzetti*, 467 U.S. 167, 173 (1984).

Review is also frequently granted where a lower court has decided an important question of federal law that should be settled by this Court. Rule 10(b). This includes issues of the construction and administration of important federal statutes. *See, e.g., United States v. An Article of Drug*, 394 U.S. 784 (1969) (lower court's interpretation of the congressional act raised issues of importance in the administration of federal statute); *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (involving an "important" question of "first impression" under the statute); *Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961) (case "presented novel questions as to the interplay" of various laws). The proper interpretation of the habeas corpus amendments in the Act, which affect so large a portion of the workload of all the federal courts, certainly is an issue sufficiently important to warrant review. *See Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 2337, 105 L. Ed. 2d 827 (1996) (certiorari granted to consider application of some portions of the Act to this Court and possible Suspension Clause problem); *Lindh v. Murphy*, No. 95–8836, 61 Crim. L. Rep. 2176, 2177 (U.S. June 23, 1997) (certiorari granted to resolve circuit conflict over retroactivity of the Act). Thus, to resolve the circuit conflict and the important issues of interpretation of the Act presented by this case,

continuing the process begun but not completed in *Felker* and *Lindh*, this Court should grant review.

B. The Act's Restrictions on Successive Petitions Apply to Competency for Execution Claims, Even In "Original" Petitions.

There seems to be no dispute that the restrictions on successive habeas petitions contained in 28 U.S.C. § 2244(b) apply to competency for execution claims. Nothing in either the language of the statute or its legislative history indicates a Congressional intent to exempt such claims from the universal language of the restrictions on successive petitions, and both the Eleventh and the Ninth Circuits agree that the restrictions apply to competency for execution claims. *In re Medina*, 109 F.3d at 1564–65; Appendix A, Slip Op. at 4–5.[1]

The two Circuits diverge, however, regarding the results of applying the Act's restrictions to competency for execution claims. *Medina* saw no problem in precluding district court habeas consideration, because of its view that an inmate can obtain adequate federal review by means of a certiorari petition or an unrestricted original habeas corpus petition to this Court. 109 F.3d at 1564. The Ninth Circuit, by contrast, sees the Act's restrictions on successive habeas petitions as applying even to original petitions to this Court, and certiorari from the state court proceeding as inadequate, because it is not a form of plenary collateral review. (App. A, Slip Op. at 5–7 and nn.3, 4.) This perceived lack of adequate federal court collateral review motivated the Ninth Circuit to reconstruct the statute, to avoid the supposed Suspension Clause problem. *Id.* at 9–12. Hence, to determine whether the Ninth Circuit's manipulation of the statute is warranted, this Court must first agree (contrary to the Eleventh

1. In its opinion the Ninth Circuit did vaguely "question whether the successive petition and abuse of the writ doctrines even apply to competency claims." (App. A, Slip Op. at 11 n.7.) However, the cases which it cites predate the Act and merely allude to the issue, without making an actual ruling. Thus, the whole area, particularly as viewed in the new light cast by the Act, has no meaningful precedent, which is itself a factor warranting review.

Circuit) that its jurisdiction to issue original writs of habeas corpus is subject to the Act's restrictions on successive petitions.

This question was touched upon, but not decided, in *Felker v. Turpin*. The time has come to resolve it, and Petitioners contend that the Act's restrictions *do* apply to such original petitions.[2] This Court has agreed since the time of Chief Justice Marshall that "power to award the writ by any of the courts of the United States must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807). The statutory authority known to him, Section 14 of the Judiciary Act of 1789, "is the direct ancestor of 28 U.S.C. § 2241," the single source from which all federal courts derive their authority to issue writs of habeas corpus. *Felker*, 116 S. Ct. at 2338 and n.1. All of Chapter 153 of Title 28 of the United States Code must be read together, with § 2241 being the grant of authority to issue writs, and the rest of the chapter providing the standards and procedures to be employed in the exercise of that authority. Many of the individual sections within that chapter specifically refer to both this Court (or its individual justices) and the lower federal courts, without drawing any distinction between them, except as required by their relative positions. See 28 U.S.C. §§ 2241(a) and (b), 2242, 2243, 2251, and 2254(a). Conspicuously absent is any differentiation between the standards and procedures to be employed by this Court and other federal courts. Chief Justice Rehnquist has referred, collectively, to "the statutes governing habeas corpus, 28 U.S.C. § 2241–2255." *Lonchar v. Thomas*, 116 S. Ct. at 1304 (concurring opinion). Similarly, *Lindh v. Murphy* refers to the Act as "amend[ing] § 2244 and §§ 2253–55 of chapter 153 . . . governing *all habeas corpus proceedings in the federal courts*." 61 Crim. L. Rep. at 2177 (emphasis added). Thus, no authority exists for this Court to issue original writs separate from the authority granted to the lower federal courts, necessitating the conclusion that this Court is subject to the same restrictions imposed on the lower federal courts.

2. Petitioners' position below (relying upon *Medina)* was that the restrictions do not apply to this Court. Reconsideration of the matter in light of the Ninth Circuit's analysis has persuaded Petitioners that the restrictions of the Act do apply to original petitions filed with this Court.

In addition to the long-standing structure of the statutes, the language of the amendments wrought by the Act demonstrates that they were intended to apply to *all* habeas proceedings, including those originating in this Court. As noted in *Felker*, the "gatekeeping" provision of the Act, now codified as § 2244(b)(3), obviously cannot apply to this Court, because it is specifically directed at applications "filed in the district court." 116 S. Ct. at 2339. However, the other restrictions on successive petitions, which are at issue here, § 2244(b)(1) and (2), "apply without qualification to any 'second or successive habeas corpus application under section 2254.'" *Id.* As the Ninth Circuit observed, "If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then §§ 2241(b)(1) and (2) should apply to the Supreme Court because they are not similarly limited." (App. A, Slip Op. at 6.)

It therefore is clear that a conflict exists among the circuits concerning a substantial question, which only this Court can answer, and the answer is that the Act's restrictions on successive habeas petitions apply to original petitions in this Court.[3] Answering that question and resolving the conflict are themselves reason enough to take this case, but other significant issues here further militate in favor of granting a writ. Although Petitioners believe that the Ninth Circuit was correct about the applicability of the Act's restrictions on successive petitions to this Court, the court of appeals was wrong in every other aspect of its decision, as shown below.

. . . .

. . . .

3. Of course, should this Court nonetheless rule that the Act's restrictions on successive petitions do *not* apply to original petitions filed with it, then the Suspension Clause problem disappears even under the Ninth Circuit's analysis, and Martinez-Villareal is ineligible for district court consideration of his claim.

II

NO SUSPENSION CLAUSE VIOLATION RESULTS FROM THE ACT'S RESTRICTIONS ON SUCCESSIVE PETITIONS, SO THE NINTH CIRCUIT ERRED IN RECONSTRUCTING THE STATUTE TO AVOID THE NONEXISTENT VIOLATION.

The premise underlying the court of appeals' handling of this case, though expressed only obliquely, is nonetheless quite clear: every criminal defendant *always* has a right to have at least one *federal court* conduct plenary *collateral review* of constitutionally-based claims. Thus, once it determined that the Act's restrictions on successive petitions apply to original habeas proceedings in this Court, it looked for alternative modes of plenary federal collateral review. Rejecting another aspect of the Eleventh Circuit's *Medina* analysis, it deemed a certiorari petition from the state court competency proceeding not "an adequate alternative form of collateral relief." (App. A, Slip Op. at 5–6 n.3.) This led to the erroneous statements that "the inapplicable gateways provided by the AEDPA foreclose *any* federal review of a death row inmate's competency to be executed," and, "If we are correct, then a state prisoner's competency claim can *never* be heard by *any* federal court." (*Id.* at 5 and 8, emphasis added.) The statements are wrong because such claims *can* be heard in a federal court, though by way of certiorari rather than by habeas corpus.

Because the perceived foreclosure of habeas was considered a likely Suspension Clause violation, and because the court of appeals believed that it had "to ensure that a petitioner's federal claims are accorded one hearing in federal court," the majority below relied on one of its own prior opinions and held that a successive competency for execution claim should be treated as not successive, to avoid triggering the Act's restrictions. *Id.* at 8–12 (discussing *In re Turner*, 101 F.3d 1323 (9th Cir. 1996)). *Turner* treated as non-successive a second petition where the first petition had been dismissed in its entirety without prejudice for failure to exhaust state remedies. The concurring judge did not believe that *Turner* could be stretched to cover the different facts of this case, but agreed that inmates' loss of the "opportunity to present all their federal claims in federal court" by means of habeas corpus,

because of the Act's restrictions on successive petitions, constituted a Suspension Clause violation. (App. A, Concurring Opinion at 13–14.) Thus, all three judges below agreed that applying the restrictions on successive petitions to competency for execution claims likely would be unconstitutional, necessitating some remedy.

The fatal flaw in this reasoning is obvious: unless there actually is a constitutional entitlement to federal collateral review of all constitutional claims arising out of state criminal proceedings, to preclude consideration of a competency claim presented in a successive petition deprives an inmate of no legal right and requires no remedy. The only source posited for such an entitlement is the Suspension Clause. As shown below, the Suspension Clause is not violated by applying the Act here, so this Court should grant review, to explain the proper ambit of the Suspension Clause, to provide a correct understanding of the Act's restrictions on successive petitions, and to correct the Ninth Circuit's errors.

A. The Constitutional Issue Cannot Be Avoided.

The majority below exempted Martinez-Villareal from the Act's restrictions on successive petitions through a transparent exercise in circular reasoning. Citing a statement in *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988), that, "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," the court of appeals briefly indicated why it believed there might be a Suspension Clause problem; then, under the guise of "construing the statute," it created a remedy for the perceived problem by effectively rewriting the Act to include three categories of successive claims (those raised before, those not raised before, and those raisable regardless of whether they had been raised before because the court views them as unique) instead of the two which Congress created. However, nowhere to be found is any discussion of the language of the statute or the legislative history, by which Congressional intent ordinarily is ascertained; instead, the court of appeals simply redrafted the statute to fit its perception

of good policy in habeas proceedings. Thus, the court of appeals created a remedy for a *presumed* Suspension Clause violation, to avoid having to determine the existence of an *actual* Suspension Clause violation, although only the existence of an *actual* violation would permit the statutory manipulation in which the court of appeals engaged.

The principle restated in *DeBartolo*, which is frequently associated with the decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), cannot justify such judicial sleight of hand. "[T]his canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication . . ." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 841 (1986). "[A] constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily." *Edmond v. United States*, ___ U.S. ___, 117 S. Ct. 1573, 1578 (1997).

> [T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. . . . When . . . nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and place them in the domain of legislation. . . . We cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question.

United States v. Locke, 471 U.S. 84, 95–96 (1985) (citations omitted).

> A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language

> employed by Congress might require a court to face a constitutional question.

United States v. Sullivan, 332 U.S. 698, 693 (1948) (rejecting narrowing construction of statute by court of appeals because it "rested not so much upon its language as upon the Circuit Court's view of the consequences that might result from the broader interpretation urged by the Government"). Thus, where the Congressional intent in the statute is clear, "that finding renders the preference for avoiding a constitutional question inapplicable." *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 n.9 (1996); *see also Swain v. Pressley*, 430 U.S. 372, 378 (1977) (clarity of District of Columbia Code provision claimed to violate Suspension Clause did not permit use of statutory construction to avoid the constitutional issue).

Section 2244(b)'s restrictions on all successive habeas corpus petitions are clear and brook no "interpretation" which magically creates a class of non-successive successive petitions exempt from those limitations. The clarity of the statutory language permits no evasion of the constitutional question. Therefore, unless this Court is content to let the Ninth Circuit set up shop for the practice of judicial legislation, it should grant review and consider the Suspension Clause problem—which, as next discussed, is not a particularly difficult issue.

B. There Has Been No Suspension Clause Violation Because What the Clause Protects is Not Modern Statutory Habeas Corpus.

In order to determine whether the Suspension Clause has been violated, it is obviously necessary to know what it is that the Clause protects. The court of appeals assumed that the Clause refers to the writ of habeas corpus as it exists today, rather than what existed in 1789, because that was the assumption made by *Felker v. Turpin*, 116 S. Ct. at 2340. (App. A, Slip Op. at 5–6 n.3.) However, *Felker* cited Chief Justice Burger's concurring opinion in *Swain v. Pressley*, 430 U.S. at 385, which expressly adopted the view that, "The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted," rather than the writ as it has been

statutorily expanded and interpreted by this Court. In both *Swain* and *Felker* it was held that even the expansive modern writ had not been "suspended," so it is clear that neither of those cases decided the true purview of the Suspension Clause. Here, by contrast, a determination of the true scope of the Suspension Clause cannot be avoided, because the plain wording of the Act leaves no room for legitimate statutory "construction."

This is not to say, however, that this Court has never expressed itself on the subject; on the contrary, it has indicated rather plainly that Chief Justice Burger's view is correct. Responding to a claim that the Suspension Clause was violated by a statute that limited availability of transcripts for use in federal habeas proceedings, this Court said:

> This argument presupposes, *inter alia*, that a right to a free transcript is a necessary concomitant of the writ which the Founders declared could not be suspended. This is obviously not the case. The writ of habeas corpus operated until 1944 with no provision for free transcripts for indigents. Congress, when in that year it authorized free transcripts for the first time, could certainly have limited the authorization to nonfrivolous cases where a need had been shown. If Congress could have thus limited the writ directly without "suspending" it, it follows that it may do so indirectly.

United States v. MacCollom, 426 U.S. 317, 322–23 (1976). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 252–56 (1973) (Powell, J., concurring demonstrates historical errors in previous cases and that the Suspension Clause is properly understood to apply to habeas corpus only as it existed in 1789); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."). It therefore appears that this Court has already determined the proper scope of the Suspension Clause to be only that which it protected at the time of its adoption, but that the Ninth Circuit (and undoubtedly many others as well) are still

laboring under the erroneous "revisionist view of the historic function that [habeas corpus] writ was meant to perform" (*Schneckloth v. Bustamonte*, 412 U.S. at 252), which Justice Powell debunked more than 25 years ago. Such error cries out for correction by this Court.

Proper analysis leaves no doubt that the scheme of habeas corpus modified by the Act is a purely statutory creature, separate and apart from the writ of habeas corpus contemplated by the Suspension Clause. Thus, Congress was free to restrict or even abolish it without violating the Suspension Clause. That Clause provides that "the privilege of the writ of habeas corpus shall not be suspended." However, no definition is provided for the critical terms. Chief Justice Marshall examined the English common law to determine the meaning of habeas corpus as used in the Clause and in the concurrently passed Judiciary Act of 1789. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). "In the early decades of our new federal system, English common law defined the substantive scope of the writ." *McCleskey v. Zant*, 499 U.S. 467, 478 (1991) (citing *Ex parte Watkins*, 3 Pet. 193, 201–03, 7 L. Ed. 650 (1830)). Therefore, to understand what the "habeas corpus" is that is being protected by the Clause, it is necessary to understand that common-law background.

An excellent historical analysis is provided by Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952) (hereafter "Collings"). Tracing English development of the writ until 1789 (*id.* at 336–38), Collings concludes:

> [A] person in custody for a crime had the immediate right either to be charged or released. If the crime charged was a misdemeanor there was a right to bail. Once properly charged with treason or a felony the only right was to a trial during the next session, which the Crown might delay. *Once convicted of a crime there was no privilege of the writ.*

Id. at 338, emphasis added.

Collings then surveys the English experience with "suspension" of the writ, which, of course, only related to *pretrial* curtailments

of liberty, because that was the extent of the common-law writ (*id.* at 339–40), and states:

> In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process. *The end result was to deny the right to trial by jury.*

Id. at 340, emphasis added. "Suspension" operated similarly on those occasions in which it occurred in America. "Certainly nowhere is there any hint that it would be suspension to postpone the right of a convicted prisoner to habeas corpus. Suspension statutes were aimed at suspects, never at convicts." *Id.* at 340–41.

Records of the Constitutional Convention and the debates concerning adoption show that there was no belief that the Constitution was establishing a new right to habeas corpus in the Suspension Clause, but rather that Congress was being restrained from suspending the existing common-law writ; no right to habeas was proposed for inclusion in the Bill of Rights. *Id.* at 341–45.

> [N]othing in the history suggests that it was ever thought to be suspension of the writ to deprive convicts of its use. It seems altogether unlikely that the First Congress viewed the habeas corpus clause as establishing an affirmative right to the privilege of the writ. If they had so viewed the clause, why did they think it necessary in the Judiciary Act of 1789 to affirmatively give the federal courts jurisdiction to issue the writ? *One is driven to the conclusion that under our constitution, at least as it was understood in 1789, there was no right on the part of convicted prisoners to the privilege of habeas corpus. Such a right, if it was to exist at all, would have to come from Congress.*

Id. at 345, emphasis added. *See also Ex parte Watkins*, 3 Pet. at 202–03 (this Court followed the English Habeas Corpus Act of 1679, which expressly excepted from its coverage "persons convicted or in execution").

Not only is it plain that habeas corpus did not extend to convicted persons at all, but it is equally clear that it did not afford any protection to persons in *state* custody. Section 14 of the Judiciary Act of 1789, 1 Stat. 82, expressly limited the reach of habeas relief to prisoners in custody "under or by colour of the authority of the United States." This statute was enacted by a Congress that included many of the drafters of the Constitution, and it is inconceivable that such a group would have passed anything it perceived as limiting or violating so dear a right as habeas corpus. The necessary conclusion is that excluding state prisoners from habeas protection was *not* a violation of the Constitution, as understood by its own drafters.

> [E]arly congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning." Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions."

Printz v. United States, No. 95-1478, 61 Crim. L. Rep. 2250, 2251 (U.S. June 27, 1997) (citations omitted).

That the Judiciary Act's preclusion of state prisoner access to habeas relief effectively deprived the federal courts of jurisdiction was acknowledged by *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). Other than a few extremely narrow situations (established by statute), no right of habeas for state prisoners existed until passage of the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. *Felker v. Turpin*, 116 S. Ct. at 2338. "*Congress* has expanded the rights of a petitioner for habeas corpus and the 'effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice . . . a more searching investigation . . .'" *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938) (emphasis added).

What Congress bestows out of legislative grace it may also limit, regulate, or take away. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (when Congress repealed an appellate jurisdictional provision, this Court acknowledged that, absent that statutory authority, it had no jurisdiction over the case); *Whitney v. Dick*, 202 U.S. 132 (1906) (courts of appeals precluded from

issuing writs), and *Ahrens v. Clark*, 335 U.S. 188 (1948) (limiting territorially district court authority to issue the writ). This Court vowed to enforce "the 1966 amendments embodied in § 2254(d) [that] were intended by Congress as limitations on the exercise of that [statutory habeas] jurisdiction." *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). Most recently, this Court in *Felker v. Turpin*, upheld the limits on successive petitions found in this very Act.

> Seemingly there is no constitutional objection in failing to make provision for habeas corpus, or even in abrogating it altogether as to particular persons or classes of persons. . . . These illustrations make it clear that an abrogation of the writ in certain cases is not unconstitutional. Surely then when Congress increases the availability of the writ, only to find abuse, it can take corrective measures.

Collings at 359–61 (citing cases).

There is no violation of the Suspension Clause in applying the Act to foreclose a successive petition by Martinez-Villareal. The Clause is only violated when the writ is restricted to a narrower compass than it enjoyed when the Clause was drafted. The writ protected by the Suspension Clause extended neither to convicts of any sort, nor to persons held under state (as opposed to federal) authority. In the debates concerning the Act, members of both houses repeatedly voiced understanding of the distinction between the modern, statutorily-created habeas writ and the "Great Writ" which is protected by the Suspension Clause. 141 Cong. Rec. H1402, H1408, H1410 (daily ed. Feb. 8, 1995);[4] S7836, S7841 (daily ed. June 7, 1995); S3447 (daily ed. April 17, 1996). Thus, Congress' intent to do only what was constitutionally permissible for it to do—modify the *statutory* writ of habeas corpus it had created in 1867, while leaving the Constitutionally-protected "Great Writ" untouched—is certain.

4. Indeed, one congressman quoted the Powell Commission Report's statement that the Constitution "does not provide for federal habeas corpus review of state court decisions." 141 Cong. Rec. H1415 (daily ed. Feb. 8, 1995).

There having been no petitions available at all for persons like Martinez-Villareal in 1789, the Act's partial return to a jurisprudential state of affairs more closely resembling that which prevailed at the time of the Founders cannot reasonably be deemed a "suspension" of the writ. Because it is plain that the Act's restrictions on successive petitions do not violate the Suspension Clause, the court of appeals' decision collapses—no violation means no grounds for redrafting the statute and no basis for either transferring Martinez-Villareal's successive petition to the district court or an order permitting it to be filed.[5]

5. It should be noted that permitting federal review of a claim of incompetency for execution solely by means of a petition for certiorari to this Court works no prejudice to the inmate because, even apart from the restrictions on both first and successive petitions created by the Act, the scope of review available is extremely narrow, almost to the vanishing point. Competency determinations are factual matters, based largely on assessment of demeanor and credibility, so that the trial judge's conclusions must be accepted if supported by the record. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Miller v. Fenton*, 474 U.S. 104, 112–17 (1985); *Maggio v. Fulford*, 462 U.S. 111, 116–18 (1983). Although not specifically stating it in those terms, it is evident that all of the opinions in *Ford v. Wainwright* contemplated that that standard of review would apply to competency for execution, as demonstrated by their discussions of whether the competency finding made there would receive the deferential treatment normally accorded state court findings of fact.

Federal cases applying *Ford* have consistently treated state court determinations of competency for execution as issues of fact, to be deferred to if supported by the evidence. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.), *cert. denied*, 115 S. Ct. 1841 (1995); *Shaw v. Armontrout*, 900 F.2d 123, 126 (8th Cir. 1990); *Graham v. Lynaugh*, 854 F.2d 715, 720–21 (5th Cir. 1988). The same would be true whether the claim was made in this Court by means of a certiorari petition or in the district court by means of a habeas petition, and where (as here) the state court conducted a meaningful evidentiary hearing on the claim, there simply would be no grounds for relief (something tacitly acknowledged by Martinez-Villareal's certiorari petition from his competency hearing, which raised only a feeble claim about Arizona's statute governing competency hearings and never challenged the trial court's and the Arizona Supreme Court's factual determination of competency). In short, inmates like Martinez-Villareal could not receive anything more from the eliminated district court review than from the review via certiorari, which still is available, so they will suffer no prejudice because of the Act.

III

REGARDLESS OF HOW THE COURT DETERMINES THE MERITS OF THE CLAIMS PRESENTED BY THIS PETITION, THE COURT POSSESSES JURISDICTION OVER THOSE CLAIMS.

A. Propriety of Relying on Multiple Jurisdictional Bases.

The appropriate basis for the Court's jurisdiction in this case is a somewhat unusual question, because it is bound up with the merits of the case. This matter reached the Ninth Circuit through a motion requesting permission to file a successive petition, as required by 28 U.S.C. § 2244(b)(3)(A). Section 2244(b)(3)(E) forbids review of rulings on such motions by either rehearing or certiorari, which suggests that Petitioners cannot approach this Court by certiorari, and can receive relief only by means of a writ under 28 U.S.C. § 1651(a). However, the Ninth Circuit refused to apply the Act and avoided its constraints on successive habeas petitions by creating a special category of "non-successive" successive petitions. If the Act and its preclusion of review do not apply here, then ordinary certiorari is available—but Petitioners' position is that the Ninth Circuit is wrong in its interpretation of the Act, so that if Petitioners approach this Court only by means of statutory certiorari, and persuade the Court that the Ninth Circuit erred in not applying the Act, they might find that they have "won" on the merits while simultaneously losing their remedy, by persuading the Court that it lacks jurisdiction to hear the case.

To avoid the possibility of being thus put out of court by the failure to know in advance how the substantive issues will be analyzed, Petitioners are bringing this combined Petition, relying on both ordinary statutory certiorari (28 U.S.C. § 1254(1)) and the various forms of relief permitted under the All Writs Act (28 U.S.C. § 1651(a)), including "common law" certiorari, prohibition, and mandamus. Multiple jurisdictional bases were utilized in *Felker v. Turpin*, where a similar issue of the Act's relation to the Suspension Clause came to this Court through a combined petition for writ of certiorari and "original" writ of habeas corpus, after the court of appeals had denied permission for

the filing of a successive petition. Analogously, this Court simultaneously entertained variously-framed petitions, brought by different parties but all raising the same issue of statutory construction, in *Ex parte Collett*, 337 U.S. 55, 57 (1949) (mandamus and prohibition), *Kilpatrick v. Texas & Pacific Ry. Co.*, 337 U.S. 75, 77 (1949) ("petition for a writ of certiorari or a writ of mandamus or any appropriate relief"), and *United States v. National City Lines, Inc.*, 337 U.S. 78, 80 (1949) (certiorari). This Court's willingness to consider all of these differently-labeled petitions seems to indicate that, where there is doubt about the appropriate vehicle by which to present an important statutory or constitutional issue, providing a variety of options, so that the procedural niceties of any particular mechanism do not prevent review, is acceptable to the Court. See R. Stern et al., Supreme Court Practice at 493–94 and n.5 (7th ed. 1996). Therefore, while Petitioners discuss below what appear to be the relevant jurisdictional concerns, this Court is urged to employ whatever procedural option it prefers to reach the merits of this Petition.

B. "Statutory" Certiorari Under 28 U.S.C. § 1254(1).

This most common mode of review is permissible upon "petition of any party to any civil or criminal case, before or after rendition of judgment or decree" regarding cases in the courts of appeals. The potential obstacle to employing this writ in this case is 28 U.S.C. § 2244(b)(3)(E), which states, "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." If this provision applies to the decision made in this case, then this Court apparently would have to resort to one of its "extraordinary writs" in order to consider the matter. However, Petitioners contend that this mode of review *is* available, because of the nature of the ruling actually made by the Ninth Circuit and because of the language of the review-prohibiting provision, so that it will not be necessary to utilize the All Writs Act to review this case.

The prohibition on review applies only to, "The grant or denial of an authorization by a court of appeals to file a second or successive application . . ." However, the Ninth Circuit neither granted nor denied authorization for the filing of a second or

successive petition. Instead, it concluded that, "Martinez-Villareal's competency claim *is not subject to the restrictions imposed by § 2244(b)*. Therefore, *we dismiss as unnecessary* Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court." (App. A, Slip Op. at 11–12, emphasis added.) Thus, the issue before this Court simply is not one to which the terms of the prohibition of review apply—the real question here is whether the court of appeals was correct that "the restrictions imposed by § 2244(b)" can legitimately be construed so as not to apply to competency for execution claims, and only if *that* decision is reversed will any court actually determine whether authorization should be granted for the filing of a second petition by Martinez-Villareal. Hence, the prohibition of review should be found not to apply here.

That this is the proper approach is demonstrated by this Court's handling of prior cases involving similar restrictions on review. In *Johnson v. Robison*, 415 U.S. 361 (1974), a suit concerning denial of veterans' benefits to conscientious objectors who had completed alternative civilian service, the obstacle was 38 U.S.C. § 211(a), which stated that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." However, this Court determined that it possessed jurisdiction to review the constitutional issues presented by the case:

> The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts[;] Appellee's constitutional challenge is not to any such decision of the *Administrator*, but rather to a decision of *Congress* to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service. Thus, as the District Court

> stated: "The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged." 352 F. Supp. at 853.

415 U.S. at 367 (emphasis in original).

A comparable issue arose in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), which concerned administration of an amnesty program for illegal aliens employed in agricultural work ("SAW's"). The statute prohibited judicial review of administrative denial of SAW status except in relation to an order of exclusion or deportation, which meant that there would be no review at all unless a deportation proceeding happened to be initiated against an unsuccessful SAW applicant. The Court nonetheless found that it possessed jurisdiction to determine the validity of the statute:

> The critical words in [the statute], however, describe the provision as referring only to review "of *a determination* respecting *an application*" for SAW status (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. Moreover, when § 210(e)(3), see 8 U.S.C. § 1160(e)(3), further clarifies that the only judicial review permitted is in the context of a deportation proceeding, it refers to "judicial review of *such a denial*"—again referring to a single act, and again making clear that the earlier reference to "a determination respecting an application" describes the denial of an individual application. We therefore agree with the District Court's and the Court of Appeals' reading of this language as describing the process of direct review of individual denials of SAW status, *rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications*.

498 U.S. at 492 (final emphasis added).

Similarly, the issues here are the proper construction of the Act (*i.e.*, whether it should be understood to apply to the *class* of

claims of incompetency for execution presented in successive habeas petitions), and the constitutionality of the Act (*i.e.*, whether it violates the Suspension Clause, if it does apply to successive petitions bringing claims of incompetency for execution), rather than an individual determination *under* the Act about whether to grant authorization for a particular successive petition. Therefore, *Johnson* and *McNary* show that the prohibition on review contained in 28 U.S.C. § 2244(b)(3)(E) does not apply to the questions raised by this case, and that this Court can exercise review by means of "statutory" certiorari, just as it did in *Felker*.

C. Jurisdiction Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and Supreme Court Rule 20.

The types of writs available under the statute have been summarized as follows:

> In general, the writ of mandamus is sought to compel a lower court to do something it has refused to do, and the writ of prohibition to prohibit it from doing something it otherwise will do. But since almost any issue may be phrased either affirmatively or negatively, these writs are often used interchangeably; frequently, indeed, counsel request both "mandamus and prohibition" to play it safe. The writ of certiorari under § 1651 orders the lower court to certify the record to the Supreme Court. This rarely used writ has been used to bring before the Court for review, in exceptional circumstances, otherwise non-appealable orders. It "is not the statutory writ of certiorari" but instead "a kind of reserve power, preserved by the 'all-writs' section, 28 U.S.C. § 1651(a), and available for use in exceptional cases."
>
> Although the several writs to some extent serve different functions, they overlap considerably, and the same general principles guide the Court in determining whether to allow each of them.

Stern et al. at 493–94 (citations omitted).

This case demonstrates the truth of these comments: we have exceptional circumstances involving an arguably non-appealable

order; Petitioners desire the district court to be prohibited from entertaining Martinez-Villareal's successive habeas petition; but the occasion for the problem is the court of appeals' usurpation of judicial power, by imposing on the Act an interpretation it will not bear so that it supposedly allows Martinez-Villareal to file a successive petition. Therefore, Petitioners are requesting this Court to utilize such of the writs as it deems proper to remedy the court of appeals' error.

Section 1651(a), as explicated by Supreme Court Rule 20, requires that for the extraordinary writs to issue: (1) such action must be in aid of this Court's appellate jurisdiction; (2) exceptional circumstances must exist that warrant the exercise of this Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court. All of these somewhat overlapping considerations are present in this case.

If this Court is considering this portion of the Petition, this Court will have necessarily determined that the "statutory" writ of certiorari is not available, presumably because of 28 U.S.C. § 2244(b)(3)(E)'s prohibition of review of determinations concerning authorization for successive habeas petitions. Implicit in such a determination is a positive response to the three conditions for issuance of a writ pursuant to Rule 20. First, if further review of the Ninth Circuit panel's decision is statutorily foreclosed, then adequate relief obviously is unavailable from any other source. The prohibition includes motions for rehearing, so Petitioners cannot obtain relief either from the panel or the *en banc* court of appeals. The prohibition also precludes certiorari, so no form of relief other than one of these writs appears to be available. No court but this one has authority to revise the action of a federal court of appeals. Thus, the third requirement is clearly met.

The first requirement is similarly fulfilled. "[W]here, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court." *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202 (1945). "Each of the prior cases in which this Court has invoked § 1651 to issue a writ 'in aid of [its jurisdiction]' has involved a particular lawsuit over which the Court would have statutory review jurisdiction at a later stage."

Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 112–13 (1970) (Harlan, J., concurring). Assuming that Martinez-Villareal is permitted to litigate another federal habeas corpus petition, there can be no question that this Court would possess "statutory review jurisdiction at a later stage" of the proceedings.

Finally, and closely related to the other factors (especially in the circumstances of this case) is the requirement that there be a showing of such "exceptional circumstances" as warrant the exercise of this Court's discretion. If no review is granted here, a single court of appeals panel will have succeeded in rewriting the Act and injecting additional proceedings and delay into capital habeas proceedings, despite recognition by all members of this Court that the Act's purpose is to expedite resolution, and *restrict* the grounds for relief, especially in successive petitions. See *Felker v. Turpin*, 116 S. Ct. at 2340 ("The Act . . . further restricts the availability of relief to habeas petitioners;" "The added restrictions which the Act places on second habeas petitions . . ."); *Lindh v. Murphy* (61 Crim. L. Rep. at 2178—Chs. 153 and 154 both "revise standards of proof and persuasion in a way favorable to a state," in addition to procedural changes; p.2179 and n.7—Congressional intent was to give states advantages, especially in "expediting capital habeas cases"). Indeed, the court of appeals' bizarre resolution of the issue not only permits, but explicitly requires, multiple habeas petitions, the first of which will *necessarily* be partially frivolous, as well as multiple warrants of execution, the first of which will never be allowed to be carried out:

> Under our holding, a competency claim *must be raised* in a first habeas petition, whereupon *it also must be dismissed* as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state considers the now-ripe competency claim, a federal court may hear that claim—and only that claim—because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

(App. A, Slip Op. at 13–14, emphasis added.) And all of this mischief will occur in proceedings in which the State lacks any meaningful remedy, if no relief is provided by means of this Court's extraordinary writ authority. Presumably the nonavailability of "statutory" certiorari, which is assumed by this argument, will be just as true in any future cases where resistance to the filing of a successive petition containing a competency for execution claim is attempted, and the State's right not to have to litigate successive petitions which should have been precluded under a correct application of the Act will, of course, have been irretrievably lost before the matter ever arrives in this Court for review on the merits.

That a writ should be granted in these circumstances is shown by *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945). A district court, at the time of the filing of the complaint, had granted an injunction restraining the corporate antitrust defendants from transferring or disposing of any of their property within the United States until completion of the case. There could be no statutory certiorari review of the injunction, because the Expediting Act precluded review of interlocutory orders in antitrust cases, but this Court granted "common law certiorari" pursuant to § 262 of the Judicial Code, the predecessor to 28 U.S.C. § 1651(a):

> If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain, under the decisions mentioned, that the petitions present an appropriate case for the exercise of our jurisdiction under § 262. As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262 it can never be corrected if beyond the power of the court below. When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports

> to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262.

325 U.S. at 217. The parallel to this case is clear: the order from the Ninth Circuit was not for relief such as would be granted at the conclusion of the case, but rather concerns a matter (interpretation of the Act's preclusion rules—a threshold determination, preliminary to litigation of the merits of the successive petition) that lies "wholly outside" the substantive issue (competency for execution); the statute purports to preclude review by certiorari; without review Petitioners will be forced to engage in litigation that ought not to occur under a correct understanding of the Act, so that "no decision on the merits" can redress that injury; "and therefore unless it can be reviewed under [§ 1651] it can never be corrected if beyond the power of the court below." Also analogous is *House v. Mayo*, 324 U.S. 42 (1945), a habeas corpus case where ordinary certiorari could not be used because no certificate of probable cause had been granted by either the district court or the court of appeals; therefore, "common law certiorari" pursuant to former § 262 was granted, to reverse the denial of the CPC and permit consideration of the merits of the habeas petition.

To grant an "extraordinary writ" in this case would be particularly appropriate in light of this Court's longstanding willingness to employ such a writ "where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *State of Maryland v. Soper,* 270 U.S. 9, 46 S. Ct. 185, 70 L. Ed. 449 (1926)." *Will v. United States*, 389 U.S. 90, 95 (1967). In *Soper*, federal revenue agents were indicted on state charges of murder for a death that occurred during a raid, but obtained removal of the case to the federal district court. When the Maryland authorities moved to have the case remanded to the state courts, the district court denied the motion. This Court recognized that the effect of the removal was that "the jurisdiction of the courts of a state to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court." 270 U.S. at 29. There was no ordinary mode of interlocutory review available, and an acquittal in the district court would, of course, mean an end of the case, preventing vindication of the state's

interests. *Id.* at 30. Therefore, to prevent improper intrusion by an inferior federal court into the criminal processes of a state (which is comparable to the intrusions that both this Court and Congress have recognized are visited upon the states through excessive habeas corpus proceedings), this Court granted mandamus and reversed the erroneous removal order. The continuing vitality of *Soper* is indicated by its citation in *Will v. United States*. Moreover, Chief Justice Rehnquist has noted (relying on these decisions) that in cases involving "the delicate area of federal-state relations," "mandamus must be more readily available [than] in other civil litigations." *Estelle v. Justice*, 426 U.S. 925, 930 (1976) (dissenting from denial of certiorari).

In sum, it appears that jurisdiction exists for this Court to review the Ninth Circuit's decision by means of ordinary "statutory" certiorari, despite the existence of the limitation on review included in the Act. If, however, the Court concludes that statutory certiorari is unavailable, it should nonetheless exercise its discretion to hear the case under whichever of the "extraordinary writs" authorized by 28 U.S.C. § 1651(a) is appropriate.

CONCLUSION

The Ninth Circuit not only is at variance with the Eleventh Circuit on major points of habeas corpus jurisprudence, but has usurped legislative authority by rewriting the 1996 Antiterrorism and Effective Death Penalty Act, even though that statute does not, in fact, contravene the Suspension Clause. The crux of the matter is that Martinez-Villareal is not constitutionally entitled to federal collateral review of his competency for execution claim, and has had ample opportunity for both state and federal review of that undeniably factual issue. Petitioners therefore respectfully urge this Court to grant certiorari, or whatever other form of writ is deemed appropriate, to obtain review of this case and decide the important matters it presents.

Respectfully submitted,

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[14353]

APPENDICES

FILED
Jun 23, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL, Petitioner, v. TERRY STEWART, Respondent.	)	No. 97-80229

Application for Order to File Successive Petition for
Writ of Habeas Corpus in the District Court
For the District of ArizonaArgues and Submitted June 9, 1997
San Francisco, California

RAMON MARTINEZ-VILLAREAL, Petitioner, v. TERRY STEWART, Respondent.	)	No. 97-80249 ORDER

Petition for Writ of Habeas Corpus

Submitted June 9, 1997
San Francisco, California

Before: D.W. NELSON, LEAVY, and T.G. NELSON, Circuit Judges

[Page 2] PER CURIAM:

Petitioner has moved for permission to file a successive habeas corpus petition in the district court pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. § 2244. We hold that § 2244's prohibition on second or successive petitions does not apply to a petition that raises only a competency to be executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986).

I.

Ramon Martinez-Villareal was convicted on two counts of first-degree murder and was sentenced to death. *See State v. Martinez-Villareal*, 702 P.2d 670 (Ariz. 1985). Martinez-Villareal filed a petition for habeas corpus in the federal district court on March 25, 1993. He asserted, inter alia, that he was not competent to be executed. The district court dismissed this claim without prejudice as premature[1] and granted the writ on other grounds. We reversed the district court's decision but explained that "[o]ur instruction to enter judgment denying the petition is not intended to affect any later litigation of [the competency to [Page 3] be executed] question." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n.1 (9th Cir. 1996).

On remand to the district court, Martinez-Villareal moved the court to reopen the first habeas proceeding. Martinez-Villareal feared that the newly enacted AEDPA would foreclose review of

1. It was the State of Arizona that had suggested to the district court that Martinez-Villareal's competency claim was not ripe for adjudication. The State pressed the importance of having

> a single adjudication of competency, *at a time when all [of Martinez-Villareal's] other claims have been resolved and a warrant has been issued*, so that an execution actually is imminent within a reasonable period of time . . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

State of Arizona's Reply to Response to Motion for Summary Judgment, Dec. 17, 1993, at 45–46 (emphasis added).

his competency claim on a second petition despite the parties' and the court's intention to address the claim once a warrant of execution had issued. On March 24, 1997, the district court denied the motion and reassured Martinez-Villareal that it had "no intention of treating the 'incompetency to be executed' claim as a successive petition."

On May 16, 1997, despite this assurance, the district court recognized that "as a result of the AEDPA, it does not have jurisdiction to entertain" Martinez-Villareal's competency claim. The district court noted that "the AEDPA effectively deprives all federal district courts of jurisdiction to entertain second petitions raising Eighth Amendment 'competency to be executed' claims." On May 19, 1997, we stayed Martinez-Villareal's execution to consider whether this is indeed the case and, if so, whether it constitutes a suspension of the writ of habeas corpus.

II.

Ford v. Wainwright holds that the Eighth Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10. However, the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of [Page 4] execution is issued by the state. *See Herrera v. Collins*, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution.").

When Martinez-Villareal first raised his competency claim in federal court, the State of Arizona had not yet issued a warrant of execution. Thus, although we disposed of every other claim raised by Martinez- Villareal in his first habeas petition, we declined to address his competency claim because it was premature. *See Martinez-Villareal*, 80 F.3d at 1309 n.1.

Even if the State had issued its warrant of execution prior to our consideration of Martinez-Villareal's first habeas petition, his competency claim still would have been premature. In *Lonchar v. Thomas*, 116 S. Ct. 1293, 1297 (1996), the Supreme Court instructed that "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the

case from becoming moot." Once this stay has been issued, the execution is not imminent, and the competency claim becomes premature. Accordingly, a competency claim cannot be asserted in a first habeas petition.

Under the AEDPA, such a claim cannot be asserted in a second petition either. Section 2244 of the AEDPA divides the world of second or successive petitions into two categories: Those that raise claims that were presented in a previous petition, and those that raise claims that were not presented in a previous petition. A claim that was presented in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1). This sanction applies to a competency [Page 5] claim raised in a first petition even though that claim can never be adjudicated because it will always be premature. Accordingly, a petitioner must reserve his colorable competency claim and present it as a new claim in a second petition. But a claim that was not presented in a prior petition must be dismissed unless

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. *See Greenawalt v.*

Stewart, 105 F.3d 1268, 1277 (9th Cir.) ("[T]he new 28 U.S.C. § 2244(b)(2)(B) forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence."), *cert. denied*, 117 S. Ct. 794 (1997). It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed. [Page 6]

III.

We are asked to decide whether this predicament constitutes an unconstitutional suspension of the writ of habeas corpus. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2.[2] Martinez- Villareal has demonstrated that a district court will never be able to hear his (or anybody's) competency to be executed claim. Whether this amounts to an unconstitutional suspension of the writ depends upon whether *any* federal court is authorized to entertain Martinez-Villareal's competency claim.

We already have noted how the new statute precludes a federal district court from hearing a colorable competency claim on either a first or second petition. Thus, whether the writ has been suspended depends on whether or not the Supreme Court may entertain a colorable competency claim in the exercise of its jurisdiction to hear original habeas applications.[3] [Page 7]

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2. The State correctly observes that the writ known to the Framers "was quite different from that which exists today." *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996). But like the Supreme Court, we assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at 2340.

3. We reject the suggestion that direct review by the Supreme Court of the state court's competency proceedings suffices to sustain § 2244 against constitutional attack. Certiorari review does not amount to an adequate alternative form of collateral relief, *see Swain v. Pressley*, 430 U.S. 372, 381 (1977), because it is not collateral review at all. We recognize that this conclusion directly contradicts the Eleventh Circuit's decision in *In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997) ("review [of a competency claim] could

(continued...)

This question was not specifically answered in *Felker*. In *Felker*, the Court concluded that the "gatekeeping" system of the new Act, codified at 28 U.S.C. § 2244(b)(3), whereby a petitioner must obtain the permission of the court of appeals before filing a second or successive petition in the district court, "does not apply to our consideration of habeas petitions because it applies to applications 'filed in the district court.'" *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996). But the Court did not decide the question of whether it was bound by the restrictions imposed by §§ 2244(b)(1) and (2)—the subsections that specifically foreclose consideration of Martinez-Villareal's competency claim.

The Court did, however, provide us with signposts suggesting its future response to this question. First, the Court noted that "[w]hether or not we are bound by these restrictions [of §§ 2244(b)(1) and (2)], they certainly inform our consideration of original habeas petitions." *Id.*

Second, the Court's reason for concluding that it is *not* bound by § 2244(b)(3) strongly suggests that it *is* bound by §§ 2244(b)(1) and (2). Section 2244(b)(3) discusses petitions that are filed "in the district court." The Supreme Court inferred that Congress therefore did not intend for that subsection to apply to petitions filed in the Supreme Court. Unlike § 2244(b)(3), §§ 2244(b)(1) and (2) do not contain limiting language and refer generally to all second or successive petitions. If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then [Page 8] §§ 2244(b)(1) and (2) should apply to the Supreme Court because they are not similarly limited.

Taken together, these signposts suggest that even the Supreme Court is bound by the new limitations on habeas review imposed by § 2244(b) and (2).[4] If we are correct, then a state prisoner's

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(...continued)
be sought through certiorari review of the state court competency proceedings").

4. We recognize that the Eleventh Circuit has reached the opposite result. We believe, however, that *In re Medina* is based upon a misreading of *Felker*. *Medina*'s conclusion that "the provisions of § 2244(b), as amended, do not restrict [the Supreme] Court's original habeas authority," 109 F.3d at 1564,

(continued...)

competency claim can never be heard by any federal court.

The constitutional problem with this preclusion is patent. Indeed, the Supreme Court upheld the AEDPA's gatekeeping provisions against attack under the Suspension Clause because such provisions were a "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker*, 116 S. Ct. at 2340. But the restrictions on successive petitions containing a colorable competency claim cannot be justified as a modified res judicata rule because res judicata cannot apply to a claim that will always be premature on a first petition.

We are left, then, with strong indications that under these narrow circumstances, the new statute poses a serious constitutional problem.[5] [Page 9]

IV.

We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of § 2244. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1268 (9th Cir. 1992).

(...continued)
ignores both the Court's statement that it is at least "informed" by §§ 2244(b)(1) and (2), as well as the literal distinction between § 2244(b)(3) and §§ 2244(b)(1) and (2).

5. *Greenawalt* did not resolve the constitutional question with which we are faced. The *Greenawalt* court rejected the petitioner's claim that § 2244 "forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence." 105 F.3d at 1277; *see also Medina*, 109 F.3d at 1565 (stating that the "plain terms" of § 2244(b)(2)(B) make it clear that "it has no application to claims that relate only to the sentence"). However, Greenawalt's sentencing claim was the type of claim that could be raised and addressed in a first petition. As we have explained, Martinez-Villareal's competency claim will never be addressed on its merits in a first petition.

In *In re Turner*, we concluded that "section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies." 101 F.3d 1323, 1323 (9th Cir. 1996). The Second Circuit arrived at the same conclusion in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996). The *Camarano* court confronted the question of "whether a habeas petition qualifies as a 'second or successive' application within the meaning of § 2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies." *Camarano*, 98 F.3d at 46. The court concluded that "because application of the gatekeeping provisions [of § 2244] to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review . . . . a dismissal without prejudice can have no preclusive [Page 10] effect on subsequent petitions." *Id.* at 46–47; *see also Christy v. Horn*, ___ F.3d ___ (3d Cir., June 5, 1997).

Turner and *Camarano* are founded upon exhaustion principles. Where a state prisoner has failed to exhaust state remedies, the federal habeas court may not grant his petition. 28 U.S.C. § 2254(b)(1). This rule obtains even where a habeas application contains both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) ("A district court must dismiss habeas petitions containing both unexhausted and exhausted claims."). Where *Rose* applies, a petitioner must return to state court and litigate the unexhausted claims before presenting those claims in a new habeas petition to the federal court.

Rose aims to "protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518. But *Rose* also ensures that a petitioner's federal claims, once exhausted, will be subject to federal review by demanding that a petition containing both exhausted and unexhausted claims be dismissed in its entirety.[6]

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6. The *Rose* Court could have permitted a federal court to dismiss only a petitioner's unexhausted claims and entertain the exhausted ones on the merits. But the abuse of the writ doctrine probably would have precluded federal review of the remaining claims once those claims had been exhausted in state court and raised in a second petition. The *Rose* Court avoided this result by requiring
(continued...)

Turner and *Camarano* sustained the viability of this scheme by ensuring that once all claims had been properly exhausted in the state courts, the state prisoner would still be able to raise his federal claims in a federal forum. To accomplish this result, [Page 11] both courts held that the new statute's reference to "second or successive petition" does not encompass petitions that are filed after original applications were dismissed in their entirety for failure to exhaust state remedies.

We are faced with a different situation. *Rose* did not require the dismissal of Martinez-Villareal's first petition in its entirety because we determined that his competency claim was premature, rather than unexhausted. Unlike the cases of *Turner* and *Camarano*, we now address a situation in which there has been a federal decision on all but one of Martinez-Villareal's constitutional claims.

We conclude, however, that the rationale underlying *Turner* applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as [Page 12] premature in order to ensure that such claims are likewise subject to federal review.

We believe that this result is justified by the fact that the normal procedural path contemplated by *Rose* and protected by

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(...continued)
dismissal of a mixed petition in its entirety.

Turner does not permit a federal court to consider a petitioner's competency claim. Let us suppose that we had dismissed Martinez-Villareal's first petition in its entirety pursuant to *Rose*. Let us also suppose that the State then issued a warrant of execution, thereby enabling Martinez-Villareal to exhaust his competency claim in state court. Finally, let us suppose that upon exhaustion of this claim, Martinez-Villareal brought a consolidated habeas petition to the federal courts containing all of his constitutional complaints, including his competency claim.

Under the rationale of *Rose* and the holding of *Turner*, we would construe this application as if it were Martinez-Villareal's first habeas petition. We would therefore be required to issue a stay of execution so that the federal court could entertain (for the first time) his constitutional claims. The federal stay of execution, of course, would render his once-ripe competency claim premature, even though it has been exhausted in the state court. Thus, while this petition may be heard under *Rose* and *Turner*, the competency claim cannot be addressed until a second warrant of execution issues, the state court once again determines that the petitioner is competent, and the claim reappears before a federal court. Of course, at this point the federal court is precluded from reviewing the competency claim if it is deemed a "second or successive" petition barred by § 2244(b). [Page 13]

As the foregoing analysis indicates, application of *Rose* to a petition that includes a competency claim does not afford any opportunity for federal review. Moreover, to dismiss an entire first petition on the basis of an unexhausted competency claim ultimately will violate one of the animating purposes behind *Rose* and modern habeas jurisprudence. Under *Rose*, the state court must have the first opportunity to consider Martinez-Villareal's competency claim. But the state court's judgment will always be discarded as moot once the exhausted petition reaches the federal court and the mandatory stay issues. As a result, the state will always be required to begin again with the competency claim once the exhausted petition is adjudicated by the federal court, the premature competency claim is sent back to the state, and a new warrant of execution has issued. To say the least, this neither "protect[s] the state court's role in the enforcement of federal law," nor "prevent[s] disruption of state judicial proceedings."

Rose, 455 U.S. at 518.

We believe that our extension of *Turner* to a competency claim that was originally dismissed without prejudice as premature avoids both a probable constitutional problem and unwarranted disrespect of state judicial proceedings. Under our holding, a competency claim must be raised in a fiirst habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim—and only that claim—because it was originally [Page 14] dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.[7]

Our holding is a narrow one that is inherently limited by the unique nature of a competency claim. Indeed, we can think of no other situation where a first petition meets *Rose*'s exhaustion requirement but a claim raised by that petition must be tabled as premature. We extend *Turner* to this circumstance, and this circumstance only.

V.

Martinez-Villareal's competency claim is not subject to the restrictions imposed by § 2244(b). Therefore we dismiss as unnecessary Martinez- Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court. We transfer the petition presented to Judge D.W. Nelson on May 30,

7. Indeed, we question whether the successive petition and abuse of the writ doctrines even apply to competency claims. As the Seventh Circuit recently noted, "[s]ection 2244(b) uses, but does not define, the phrase 'second or successive habeas corpus application.'" *Benton v. Washington*, 106 F.3d 162, 163 (7th Cir. 1996). Due to its exceptional procedural posture, a petition raising only a competency claim might not be covered by this phrase. *See Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995) ("Because *Ford* claims . . . concern the petitioner's immediate mental state, neither this court nor the Supreme Court has definitively decided whether relief would appropriately be denied on either abuse of the writ or successive petition grounds."); *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ.").

1997 (Docket No. 97-80249), to the district court pursuant to 28 U.S.C. § 2241(b).[8] [Page 15]

8. Henceforth, a state prisoner in Martinez-Villareal's situation—that is, one who seeks to file a petition that contains *only* a competency to be executed claim where such a claim previously had been dismissed as premature—may file such a petition directly with the district court.

FILED
June 23, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Judge T.G. Nelson, specially concurring:

In my view, the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims. It does so in an unambiguous fashion, by prohibiting the consideration of claims in second or successive petitions that do not fit the exceptions found in § 2244(b)(1) and (2). As we point out in the order, Martinez-Villareal's competency to be executed claim cannot come within the statutory exceptions.

In *Turner*, we "looked through" a prior petition that had been dismissed without action. Since the earlier petition had no practical or legal effect, it was appropriate to simply ignore it. By contrast, the petition which was the subject of our prior opinion was perhaps Martinez-Villareal's third try at getting into federal court, and was extensively litigated by the parties, to the point of denial of *certiorari* by the Supreme Court. 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). Thus, I don't believe *Turner* justifies our ignoring several years of litigation in the federal courts.

The law as it existed prior to the Act gave state prisoners the *opportunity* to present all their federal claims in federal court. They could lose the opportunity if they neglected to include a claim in a first petition. However, "old" § 2244(b) allowed the consideration of successive petitions containing "new grounds," if the "ends of justice" would be served. This opportunity was eliminated by the 1996 amendments to § 2244. [Page 2]

As we noted in our prior opinion, a petitioner could come to federal court with a procedurally defaulted claim if the petitioner can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law." 80 F.3d at 1305. A showing of cause required the petitioner to demonstrate the existence of an objective factor external to the defense which hampered efforts to comply with the procedural rule. *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The lack of

ripeness of a claim of incompetence to be executed would appear to be a classic case of an external impediment to presentation of the claim.

Thus, on April 23, 1996, a claim involving lack of competency to be executed could be considered in a successive petition filed in federal court. On April 24, 1996, and since, under the clear terms of § 2244, such claims simply cannot be considered by any federal court, in spite of the fact that there was no earlier opportunity to do so. If the writ has not been suspended as to those claims, it is difficult to see how it can ever be suspended as to any class of claims.

My conclusion that the writ has been suspended as to claims such as Martinez-Villareal's would require an analysis of the appropriate remedy to ensure that Martinez-Villareal could get to federal court. The remedy we order, the transfer to the district court of the petition filed here, is an appropriate one, and I fully concur in the result.

13–4021. Competency to be executed; definition

A. A person who is sentenced to death shall not be executed as long as he is mentally incompetent to be executed.

B. As used in this article, "mentally incompetent to be executed" means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death.

13–4022. Determining competency

A. If after a sentence of death is imposed the director of the state department of corrections, the prisoner's attorney or an attorney for the state has good reason to believe that the prisoner may be mentally incompetent to be executed, the director, the prisoner's attorney or an attorney for the state may file a motion in the superior court in the county in which the prisoner is located setting forth the facts relating to the prisoner's conviction and sentence and the facts giving rise to the belief that the prisoner may be mentally incompetent to be executed and requesting the court to order that the prisoner be examined for mental competency to be executed.

B. A stay of execution may not be granted by the superior court on the filing of a motion for examination of competency. If a stay is desired before the superior court rules on the motion, an application for a stay shall be submitted to the supreme court.

C. On receipt of a motion for examination of competency, the superior court shall determine if the motion is timely and presents reasonable grounds for the requested examination. If the motion is timely and presents reasonable grounds for the requested examination, the court shall appoint experts pursuant to the Arizona rules of criminal procedure. The appointed experts shall make copies of their reports available to all of the parties. The parties shall also disclose to the appointed experts and to each other the names and addresses of any other previously undisclosed mental health experts who have examined the prisoner and the results of the examinations.

D. After the examinations are completed, the court shall conduct a hearing to determine the prisoner's competency to be executed. At the hearing, all the parties may present evidence, cross-examine witnesses and present argument or by stipulation may submit the matter for the court's determination on the basis of the experts' reports.

E. Prisoners who are sentenced to death are presumed competent to be executed. A prisoner may be found incompetent to be executed only on clear and convincing evidence of incompetency.

F. The superior court shall specifically state its findings on the record. If the court finds that the prisoner is competent, the director of the state department of corrections shall execute the judgment as specified in the warrant. If the court finds that the prisoner is incompetent, the court shall suspend the execution and shall immediately transmit a copy of its order to the supreme court. The prisoner shall remain in the custody of the state department of corrections until the time for review has expired or a supreme court review is completed. If no review is sought or the supreme court upholds the finding of incompetency to be executed, the director of the state department of corrections shall deliver the prisoner to the state hospital. The prisoner shall remain confined at the state hospital until the prisoner becomes competent to be executed.

G. Within five days after the superior court grants or denies the motion for examination or rules on that motion, a person may file with the supreme court a petition for special action of the superior court's decision to grant or deny an examination for competency or order determining the prisoner's competency to be executed.

H. If a hearing to determine competency is held, the clerk of the court shall prepare a statement of the costs incurred by the county on the hearing. The judge shall certify the statement and shall forward it to the governor for approval. After approval, the governor shall order that the costs be paid to the county treasurer in the county in which the hearing was held from monies appropriated to the state department of corrections.

13–4023. Recovery of competency

A. Sixty days after a prisoner is committed to the state hospital, the chief medical officer of the state hospital shall file with the superior court a report setting forth the treatment being provided, the status of the prisoner and the prognosis as to when the prisoner will be competent. The chief medical officer shall provide copies of the report to all of the parties. The chief medical officer shall update the report every sixty days until the prisoner is deemed competent to be executed.

B. After a prisoner recovers competency to be executed, the chief medical officer of the state hospital shall return the prisoner to the state department of corrections and shall certify to the supreme court that the prisoner is competent. The supreme court shall order that the execution be conducted according to the original warrant, if unexpired, or shall issue a new warrant appointing a time for execution on the judgment.

13–4024. Late or successive motions

A. A motion for an examination under section 13–4022 that is filed fewer than forty-five days before a scheduled execution is deemed late and shall not be considered by the court unless it is accompanied by both of the following:

1. At least one affidavit from a licensed physician or licensed psychologist who has examined the prisoner that states the physician's or psychologist's opinion that the prisoner is not competent to be executed.

2. A statement that establishes good cause for the failure to file the motion in a timely manner.

B. If a motion for an examination under section 13–4022 has been denied, if a hearing has been held or if a certificate has been issued by the chief medical officer of the state hospital, no further hearings on competency may be granted unless the successive motion is accompanied by an affidavit that shows a substantial change of circumstances since the previous determination of competency was made and the showing is sufficient to raise a significant question about the prisoner's competency to be executed.

ORIGINAL

No. 97-300

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Supreme Court, U.S.
FILED
SEP 17 1997
CLERK

IN RE TERRY STEWART, ET AL.,

Petitioners.

MOTION TO PROCEED IN FORMA PAUPERIS

Ramon Martinez-Villareal moves this Court for leave to file the attached Brief in Opposition in this case without payment of costs and to proceed in forma pauperis. Mr. Martinez-Villareal was found indigent by the United States district court below, and counsel was appointed to represent him in those proceedings, and

41 pp.

proceedings in the Court of Appeals under 21 U.S.C. § 848(q).

Respectfully submitted this 17th day of September, 1997.

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Counsel for Ramon Martinez-Villareal

No. 97-300

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

IN RE TERRY STEWART, ET AL.,

Petitioners.

BRIEF IN OPPOSITION TO COMBINED ALTERNATIVE PETITION FOR STATUTORY WRIT OF CERTIORARI OR FOR EXTRAORDINARY WRIT (MANDAMUS, PROHIBITION, OR COMMON LAW WRIT OF CERTIORARI)

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioners' "Combined Alternative Petition" does not properly present the questions it purports to raise, but instead presents the following questions:

1. Whether this Court has jurisdiction to review the Court of Appeals' action below, in light of 28 U.S.C. § 2244(b)(3)(E) which prohibits judicial review of a Court of Appeals' judgment allowing a petitioner to file a second habeas petition in the district court, and Felker v. Turpin, 116 S.Ct. 2333 (1996) which held this prohibition constitutional?

2. Whether the Court of Appeals' action below calls for this Court's review or intervention, when it was based on the conclusion--reached by every other Court of Appeals that has considered the question--that the dismissal of a constitutional claim in a first habeas corpus petition without a resolution of its merits and on motion of the state respondents, does not render a later petition seeking review of that claim a "second or successive" petition barred under 28 U.S.C. §2244(b)?

3. Whether the extraordinary equitable relief sought by the Petitioners is warranted in light of the Petitioners' conduct in this litigation?

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OPINIONS BELOW

In addition to the opinion identified by Petitioners, the Ninth Circuit Court of Appeals also issued an opinion on May 19, 1997, in Martinez-Villareal v. Stewart, 118 F.3d 625 (9th Cir. 1997), deciding other issues raised in this case, and an Order on June 25, 1997, denying as moot Mr. Martinez-Villareal's petition for rehearing and suggestion for rehearing en banc on these issues. See Exhibit A.

JURISDICTION

Petitioners present no plausible jurisdictional basis for this Court to review the action of the Court of Appeals below.

A. Certiorari Jurisdiction

Petitioners ask this Court to review the Court of Appeals' disposition of Mr. Martinez-Villareal's authorization motion brought under 28 U.S.C. §2244. But the same 1996 amendments to the habeas corpus statute that Petitioners claimed in the court below required the Court of Appeals to authorize, or decline to authorize, Mr. Martinez-Villareal's habeas petition also restricted this Court's jurisdiction to review that authorization decision:

> the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3)(E). This Court has upheld the constitutionality of this restriction, stating that it "preclud[es this Court] from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court..." Felker v. Turpin, 116 S.Ct. 2333, 2338-39 (1996).

Petitioners claim that §2244(b)(3)(E)'s prohibition on

certiorari review does not apply because the appellate court "dismissed" the §2244 motion, rather than "denied" it. The statute's clear prohibition on certiorari review does not depend on the label used by the appellate court. Whether the appellate court denies, grants or dismisses the authorization motion, the prohibition on certiorari remains the same. Some appellate courts, like the Court of Appeals here, have "dismissed" authorization motions after concluding that the habeas petition was not a second or successive petition within the prohibition of § 2244(b). In those cases, certiorari review has not been sought, presumably because the respondents knew no jurisdiction existed. See e.g., Camarano v. Irvin, 98 F.3d 44 (2nd Cir. 1996). Still other appellate courts reaching this same conclusion have "denied" the authorization motion. See, e.g., In re Turner, 101 F. 2d 1323 (9th Cir. 1997); Benton v. Washington, 106 F.2d 162 (7th Cir. 1996). And other appellate courts simply hold that the petition is not a "second or successive petition within the meaning of 28 U.S.C. § 2244(b), and can be filed in the district court. Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996). Despite the different labeling, and even where no label is used, judicial review of the authorization decision by

certiorari is prohibited.[1]

B. Extraordinary Jurisdiction.

Implicitly acknowledging the lack of statutory certiorari jurisdiction, Petitioners propose an array of alternative extraordinary writs in an attempt to get this Court to review a decision Congress had exempted from its review. Petitioners first ask this Court to find jurisdiction under the writ of mandamus or writ of prohibition to review the authorization decision. Although unclear, it appears that they are asking this Court to prohibit the lower district court from considering Mr. Martinez-Villareal's competency claim, and "to remedy the court of appeals' error." Combined Alternative Petition at 25. But

[1]Petitioners' reliance on Johnson v. Robison, 415 U.S. 361 (1974) and McNary v. Haitain Refugee Center, Inc., 498 U.S. 479 (1991), is misplaced. First, this case does not seek judicial review of action taken by an federal agency where a "strong presumption" favoring judicial review applies. McNary, 498 U.S. at 498. Second, in both those cases, the statute prohibited judicial review of the agency's determination that an individual did or did not qualify for a certain status or benefits under the relevant statute. McNary v. Haitian Refugee Center, Inc., 498 U.S. at 493-94; Johnson v. Robison, 415 U.S. at 373-74. However, this Court found that it had jurisdiction over challenges to the constitutionality of the statutes. Id. Here, Petitioners do not challenge the constitutionality of § 2244(b)(3)(E), and this Court has already determined that this statutory provision is constitutional. Felker v. Turpin, 116 S.Ct. at 2338-39.

Petitioners did not name or serve as respondents the Court of Appeals' judges, or the District Court judge "against whom relief is sought". Sup.Ct.Rule 20.3(a) and (b).[2]

In addition, the relief they request is not "necessary or appropriate in aid of" this Court's jurisdiction to review the Court of Appeals' authorization decision, see 28 U.S.C. § 1651, because, as explained, there is no review jurisdiction over this decision. Once the lower courts have reviewed Mr. Martinez-Villareal's competency claim, this Court will have jurisdiction to review on certiorari the ultimate disposition. However, the relief requested by Petitioners clearly cannot "aid" that potential jurisdiction. 28 U.S.C. § 1651. This appellate review then remains unobstructed. See Roche v. Evaporated Milk Ass'n, et al., 319 U.S. 21, 26 (1943)("while function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute").

Moreover, the fact that Petitioners must await the outcome of the District Court proceedings before petitioning this Court

[2]They also did not name Mr. Martinez-Villareal as a respondent, although he was served with the Combined Alternative Petition.

for review does not justify use of the extraordinary writ. See United States Alkali Association v. United States, 325 U.S. 196, 202 (1945); Roche v. Evaporated Milk Ass'n. et al., 319 U.S. at 31. This is particularly so here where the delay is caused solely by Petitioners' actions. They were the ones who asked the federal courts to dismiss the competency claim without prejudice because it was not yet ripe. They were the ones who asked the federal courts to hear the claim at this time--after all Mr. Martinez-Villareal's other claims had been resolved. They were the ones who specifically requested multiple federal proceedings in this case. They can hardly be heard to complain now about delay, and to invoke this Court's extraordinary remedies.

"Although the remedy by mandamus is at law, its allowance is controlled by equitable principles." United States ex rel. Greathouse v. Dern, 289 U.S. 352, 359 (1933). See Duncan Townsite Co. v. Lane, 245 U.S. 308, 311 (1917)("Although classed as a legal remedy, its issuance is largely controlled by equitable principles."); U.S. Dept. Of Energy v. Roth, 882 F.2d 519, 521 (Em.App. 1989)(writ of mandamus "has been viewed in the same light as equitable remedies"); Morrow v. District of Columbia, 417 F.2d 728, 736 (D.C.Cir. 1969)("The governing principles are equitable, even though the writ of mandamus

technically issues at law."). The equities do not favor Petitioners' request.

Nor do exceptional circumstances exist to invoke this extraordinary remedy. The writ "has traditionally been used in the federal courts only `to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Will v. United States, 389 U.S. 90, 95 (1967), quoting Roche v. Evaporated Milk Ass'n., 319 U.S. at 26. Thus, "only exceptional circumstances amounting to a judicial `usurpation of power' will justify the invocation of this extraordinary remedy." Kerr v. United States District Court for the Northern Distri t of California, et al, 426 U.S. 394, 402 (1976), quoting Will v. United States, 389 U.S. at 95. To invoke this remedy, Petitioners must show that their right to it is "clear and indisputable." Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953). As demonstrated below, Petitioners cannot make this showing.

For all these reasons, jurisdiction is inappropriate under § 1651 and contrary to Congressional limitations on the review of authorization decisions under § 2244(b)(3)(E).

I. STATEMENT OF THE CASE

Petitioners attempt to invoke yet another procedural artifice to prevent judicial review of Ramon Martinez-Villareal's constitutionally dubious sentence of death. Ramon Martinez-Villareal is mentally ill, mentally retarded, brain-damaged, unable to speak English and unable to read any language. The sentencing judge, members of the Arizona Supreme Court, and the U.S. District Court have all expressed concerns about the propriety of Mr. Martinez-Villareal's execution in light of his feeble mental condition. However, Petitioners have employed a series of crafty procedural ploys to prevent judicial review of constitutional claims that arise from Mr. Martinez-Villareal's severe disabilities. The ruling below simply tailored a remedy, specific to the unprecedented facts of this case, which allows Mr. Martinez-Villareal to be heard on his claim that he is mentally unfit for execution.

A. Procedural History

Petitioners present a somewhat misleading view of the procedural posture in which the issues in this case arise. In 1991, counsel for Mr. Martinez-Villareal gained access to his medical and psychiatric files after much resistance from Petitioners. Those files establish that Mr. Martinez-Villareal had been treated for psychosis by prison psychiatrists since 1986. Sean Bruner, Martinez-Villareal's newly appointed counsel, raised the competency issue in the courts of Arizona promptly after obtaining those records.[1]

Counsel for Petitioners successfully urged the dismissal of Mr. Martinez-Villareal's competency claim from his state post-conviction motion because he should have proceeded under a state statute governing competency for execution. Counsel for Mr. Martinez-Villareal then attempted to invoke the statutory procedure, but was unsuccessful because former A.R.S. § 13-4022 (1978)(repealed 1993) provided that only the Director of the Department of Corrections could initiate judicial inquiry into a prisoner's competence for execution, and the Director refused counsel's written pleading that he do so. After thus exhausting his state remedies, Mr. Martinez-Villareal sought federal habeas corpus review of his claims, including his exhausted, undefaulted and unadjudicated claim that he is incompetent for execution.

---

[1]The claims based on Mr. Martinez-Villareal's mental disabilities included ineffective assistance of counsel as well as lack of competence for execution. He obtained sentencing relief on his claim of ineffective assistance of counsel. On appeal, the Ninth Circuit vacated the resentencing order solely on the grounds of procedural default. Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir.), cert. denied, 117 S. Ct. 588 (1986).

1. Events Preceding Dismissal Without Prejudice

In 1993, in his first appearance before the District Court, Mr. Martinez-Villareal alleged that he "did not and does not have the mental capacity to appreciate the nature of his sentence." Amended Petition for Writ of Habeas Corpus ("Habeas Petition"), filed Mar. 26, 1993 at ¶ 4.16, and that under Ford v. Wainwright, 477 U.S. 399 (1986), his execution would violate the Eighth and Fourteenth Amendments. Id. at ¶ 106.

Petitioners argued that the District Court did not have jurisdiction to hear the claim because it was "not now ripe for determination" and should be brought when an execution "warrant has been issued." Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45-46 (Dec. 17, 1993). Describing Mr. Martinez-Villareal's desire to have the claim decided at that time as "unworkable," Petitioners stated that it was important to:

> have a single adjudication of competency, at a time when all [petitioner's] other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time...To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

Id.(emphasis added). Although Mr. Martinez-Villareal's claim was exhausted, not procedurally barred, and unadjudicated by the

state court, the District Court adopted Petitioners' position:

> At present, there is no execution warrant outstanding as to Martinez-Villareal since this Court issued its stay. Thus, Martinez-Villareal is not facing execution nor with appellate review will he face likely execution in the near future. This claim is premature and denied without prejudice.

Order and Memorandum Opinion, Oct. 21, 1994, at 19(emphasis added).

The District Court granted sentencing relief after finding that trial counsel was ineffective. Order and Memorandum Opinion, Oct. 21, 1994, at 30.

On appeal, the Ninth Circuit Court of Appeals found that the writ was improperly granted because Mr. Martinez-Villareal's claim of ineffective assistance of counsel was procedurally barred. Martinez-Villareal v. Lewis, 80 F.3d at 1305. The court explicitly stated, however, "[t]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question." Id. at 1309, n.1 (emphasis added).

2. Events Following Dismissal Without Prejudice

On remand, the District Court entered an order again

denying, "without prejudice," Mr. Martinez-Villareal's exhausted, undefaulted and unadjudicated competency challenge. Order and Entry, Feb. 28, 01997. [Doc. Nos. 152 and 153]. Mr. Martinez-Villareal's counsel, however, moved to amend the judgment pursuant to Fed.Civ.P. Rule 59 "direct[ing] the Court's attention" to the Antiterrorism and Effective Death Penalty Act ("AEDPA) [the amendments to the federal habeas corpus statutes enacted in 1996] and quoted 28 U.S.C. §2244(b)(1), (b)(3)(A) and §2255. Counsel for Mr. Martinez-Villareal summarized the possible effect of these new enactments, noting:

> In other words, petitioner's claim of incompetence to be executed would be barred notwithstanding this Court's dismissal "without prejudice." This would contravene the clear intention of the parties, violate due process under the Fifth and Fourteenth Amendments, and constitute an unconstitutional suspension of the writ of habeas corpus in violation of Art. I, Sec. 9 of the Constitution.

Martinez-Villareal v. Stewart, No. CIV 86-296-TUC-RMB, Motion to Reconsider Order and Judgment (Mar. 11, 1997). Mr. Martinez-Villareal's counsel urged the District Court to reconsider the order dismissing this claim, and hold "the issue in abeyance pending the outcome of the current proceedings" ongoing in state

court. Id. at 2. Petitioners did not respond.[2]

The District Court denied Mr. Martinez-Villareal's motion, stating that the competency to be executed claim "was not ripe when it was presented. For this reason, the Court dismissed it without prejudice." Noting that Mr. Martinez-Villareal "warn[ed] the Court that the premature claim could be precluded as a successive claim" by the AEDPA, the Court stated that it "has no intention of treating the 'incompetency to be executed' claim as a successive petition." Order, Mar. 24, 1997 [Doc. No. 155], at 1. Again, Petitioners said nothing before or after this order was issued.

On April 15, 1997, the Arizona Supreme Court rescheduled Mr. Martinez-Villareal's execution for 12:05 a.m. on Wednesday, May 21, 1997. State v. Martinez-Villareal, No. CR-83-0207 AP (Ariz. Apr. 15, 1997). A competency hearing was held in the Pinal County Superior Court on April 6, May 6, 7 and 8, 1997.

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[2]The Arizona Supreme Court issued a warrant setting Mr. Martinez-Villareal's execution for April 16, 1997, then resetting it for May 21, 1997. Counsel for Mr. Martinez-Villareal moved for a hearing on his client's mental competence for execution before any warrant was issued. Petitioners state, "In early 1997, the defense *finally* filed a motion under the statute dealing with competency for execution, requesting a hearing." (Pet. at 2). The implication that Mr. Martinez-Villareal's counsel had not previously exhausted all available means for raising this claim under Arizona law is misleading.

Substantial evidence and testimony established that Mr. Martinez-Villareal suffers from a major psychotic disorder, which was traced back to his childhood, and that his condition is compounded by mental retardation and brain damage. The state claimed that Mr. Martinez-Villareal is malingering the symptoms of his mental illness.

Prior to and during the hearing, counsel for Mr. Martinez-Villareal asked the Arizona state court for leave to conduct a MRI scan and EEG of Mr. Martinez-Villareal and for examination by an expert specializing in the field of mental retardation. Counsel explained that the accusation that Mr. Martinez-Villareal was malingering his condition increased the need for a reliable determination of the issues of brain damage and mental retardation. All of the requests were denied and Mr. Martinez-Villareal had no opportunity to present such evidence. Although no state expert disputed Mr. Martinez-Villareal's brain damage or mental retardation, none of them performed any tests to determine the severity of these conditions or whether they interfered with his ability to understand or appreciate his impending execution.[3]

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[3]Mr. Martinez-Villareal has no appreciation of his pending execution and the reasons for it, and he has been incapable of assisting his counsel or participating in his appeals of his conviction and sentence of death. Though Mr. Martinez-Villareal has parroted statements that Department of Corrections staff interprets as evidence that he is aware that he has been convicted of murder and that he is to be executed, those very statements reflect the absence of a rational understanding of his conviction and sentence. In one statement, after asserting his innocence of the crime, Mr. Martinez-Villareal insisted that the transvestite clothing of the real killer is in his property in the prison. In another statement, he wrote a letter to his long-deceased sister asking her to arrange for the disposal of his earthly remains. Mr. Martinez-Villareal has never displayed or communicated a rational awareness of the judicial process that convicted him of murder and sentenced him to death.

On May 9, 1997, the state court determined, inter alia, that:

> Credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer form a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestations of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by the law . . . .

State v. Martinez-Villareal, No. CR-97022291, Minute Entry (May 9, 1997)(emphasis added). The state court concluded Mr. Martinez-Villareal failed to prove by clear and convincing evidence that he was not competent to be executed. Id.

The next court day, Monday, May 12, 1997, Mr. Martinez-Villareal filed a special action with the Arizona Supreme Court, pursuant to A.R.S. §13-4022(G), to review the lower court's order, and a motion to stay his execution. On Tuesday, May 13, 1997, the Arizona Supreme Court issued an order stating that it "will try to resolve the issues" by May 16 or May 19, 1997. Martinez-Villareal v. Pinal County Superior Court, et al., No. CV-97-0206-SA (May 13, 1997).

3. Proceedings On Claim Previously Dismissed Without Prejudice.

On May 13, 1997, counsel for Mr. Martinez-Villareal moved the District Court for appointment of counsel and for the tests and examinations which the state court had denied so that the District Court could decide whether his competency to be had been reliably determined in accordance with the Eight Amendment. Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Motion for Expert Services and Appointment of Counsel (May 13, 1997).[4] On

[4]Petitioner had earlier sought appointment of counsel which had been denied by the District Court. In response to that motion, Respondents never mentioned its belief that the District Court had no authority to consider the supplemented Ford claim. Instead Respondents took no position on appointment of counsel and merely asked the District Court "in the interests of clarity" to assign "an appropriate new cause number to be used in these proceedings" so that there would be "some means of referring to such new activity." Martinez-Villareal v. Stewart, No. CIV 86-

May 14, 1997, the District Court appointed counsel and scheduled a conference regarding the motion for expert services or access on May 15, 1997, at 2:30 p.m.

On May 15, 1997, Petitioners responded to the motion and for the first time, claimed that the District Court "lacks jurisdiction to take any action" because the claim is "successive." Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997) at 1 (emphasis in original). Petitioners contended that under newly amended 28 U.S.C. §2244(b), Mr. Martinez-Villareal's claim "simply cannot be entertained in a successive petition." Id. at 2.

Mr. Martinez-Villareal's counsel responded that Petitioners should be judicially estopped from this about-face because of their earlier inconsistent position. Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Reply to Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997).

At the hearing, the District Court, the Honorable Richard Bilby, expressed concerns, based on Petitioners' argument, that

296-TUC-RMB (Mar. 28, 1997).

the AEDPA withdrew his jurisdiction. Judge Bilby indicated that he believed Mr. Martinez-Villareal was severely ill and mentally retarded and was not malingering. The District Court declared:

> This Court can only state that its observations of the Petitioner in 1994 called into serious doubt the Petitioner's competence. At the three-day evidentiary hearing ... the State psychiatrist testified that if the Petitioner was presently incompetent, it was because he was not receiving the correct medication. The Court then asked the psychiatrist if that meant that the State could medicate in order to eradicate. The expert answered "yes." The report of Dr. Jonathan Pincus, dated April 1, 1997, states that the Petitioner has not been receiving medication. See Exhibit C to Motion for Expert Services. This fact alone raises serious concerns in the mind of this Court as to whether the Petitioner is presently capable of understanding 1) that he is to be punished by execution, and 2) why he is being punished. Without more guidance from the Ninth Circuit or the United States Supreme Court, this Court concludes that it lacks jurisdiction to review the state court proceedings below to ensure that the Petitioner is receiving his medication and, therefore, is competent to be executed.

Martinez-Villareal v. Stewart, No. CIV-86-296-TUC-RMB (D. Ariz. May 16, 1997) slip at 3-4. Although Judge Bilby clearly wanted to hear this claim, he believed he had no jurisdiction to do so.

The same day that the District Court entered its order, the Arizona Supreme Court denied Mr. Martinez-Villareal's petition

for Special Action to review the superior court's competency ruling. Two members of that Court expressed serious reservations about allowing his execution to go forward:

> The definition of incompetence [for execution] is quite narrow. However, the evidence makes it clear that Defendant is mildly retarded and seriously mentally ill. He may well have been in that condition at the time of the crime. At the mitigation hearing, his lawyer did not present evidence of his mental condition or problems. . . . In short, this is a case that raises serious doubts about the propriety of the death sentence.

Martinez-Villareal v. Pinal County Superior Court, No. CV-97-0206-SA (AZ, May 16, 1997) (Zlacket, C.J., and Feldman, J., concurring).[5]

In providing Mr. Martinez-Villareal an opportunity to seek federal court enforcement of his Eighth Amendment rights, the court fashioned a remedy to fit the unprecedented procedural

---

[5]Even as the Arizona Supreme Court and the District Court were handing down their orders, the Justice of the Peace and the trial judge were testifying before the Arizona Board of Clemency. Judge Robert Montiel, who sentenced Mr. Martinez-Villareal to death without the benefit of any evidence regarding his mental retardation, brain damage and mental illness, testified that he believes Mr. Martinez-Villareal's execution would be unfair. Justice of the Peace Eduardo Saavedra, who initially arraigned Mr. Martinez-Villareal, also expressed concern, based on his observations, that Mr. Martinez-Villareal was unable to understand the proceedings.

posture of this competency claim:

> Under our holding, a competency claim must be raised in a first habeas petition, whereupon it must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim--and only that claim--because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

Martinez-Villareal v. Stewart, 108 F.3d 628, 634 (9th Cir. 1997). The court described its ruling as "a narrow one that is inherently limited by the unique nature of [Mr. Martinez-Villareal's] competency claim." Id. This ruling is the subject of Petitioners' scatter-gun request for this Court's intervention.

II. REASONS FOR DENYING THE WRITS

A. The Court Lacks Jurisdiction Over The Case.

28 U.S.C. § 2244(b)(3)(E) prohibits judicial review of the Court of Appeals' action on Mr. Martinez-Villareal's authorization motion. Review by the various extraordinary writs Petitioners seek to invoke is also unavailable because they can not make the necessary showing. See Jurisdiction, supra. On this basis alone, this Court should deny the Combined Alternative

Petition.

B. The Court of Appeals Did Not Find That The 1996 Amendments To 28 U.S.C. § 2244 Constitute A Suspension Of The Writ.

The first two questions presented by Petitioners ask this Court to interpret the Suspension Clause of the Constitution. However, the court below clearly rested its decision, as a matter of statutory interpretation, on its finding that, under the rare circumstances of this case, Ramon Martinez-Villareal's habeas petition does not present "successive" claims within the meaning of the AEDPA. Martinez-Villareal v. Stewart, 118 F.3d at 634. Thus, questions concerning the Suspension Clause are not presented here.

C. The Court Of Appeals' Decision That This Was Not A "Second or Successive" Petition Because The Claim It Raised Was Not Previously Adjudicated On Its Merits Is Consistent With The Decision Of Every Other Circuit That Has Addressed The Question.

The Court of Appeals decided this case under extremely narrow grounds:

> Under our holding, a competency claim must be raised in a first habeas petition, whereupon it must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim--and only that claim--because it was

> originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

Martinez-Villareal v. Stewart, 118 F.3d at 634. The court described its ruling as "a narrow one that is inherently limited by the unique nature of [Mr. Martinez-Villareal's] competency claim." Id. The ruling Petitioners complain of is bound up in a factually detailed procedural history surrounding Mr. Martinez-Villareal's persuasive evidence of mental incompetence.

Counsel has been unable to find a case reported anywhere in the United States where a prisoner presented a competency claim in a first petition that was dismissed without prejudice on the state's motion that would fit within this narrow holding. The court below observed, "Indeed, we can think of no other situation where a first petition meets [Rose v. Lundy's] exhaustion requirement but a claim raised by that petition must be tabled as premature." Because courts had not applied the abuse of the writ doctrine to claims regarding present competency for execution, cases in which a first petition presents a competency to be executed claim will be extremely rare. See Barnard v. Collins, 13 F.3d 871, 878 (5th Cir. 1994)("our research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed

claim on grounds of abuse of the writ."). Thus, the ruling below is likely to effect very few, if any, other cases.

The court below was concerned with the obvious inequities that would result from retroactive application of the AEDPA to effectively amend a judgment of the Ninth Circuit Court of Appeals by converting a dismissal without prejudice to a dismissal with prejudice. The Court of Appeals simply gave effect to its prior order, entered at Petitioners' behest, dismissing Mr. Martinez-Villareal's competency to be executed claim without prejudice.

Petitioners allege that the ruling of the court below conflicts with In re Medina, 109 F.3d 1556 (11th Cir. 1997). This allegation ignores the substantially different procedural posture of each case and the extremely narrow ruling of the court below, tailored to the unique facts of this case. Unlike Medina, Mr. Martinez-Villareal sought review of his competency-to-be-executed claim on his first federal habeas petition, after the state summarily refused to even consider the issue under a properly-invoked state procedure. Unlike Medina, Mr. Martinez-Villareal's claim was dismissed without prejudice from his first petition on the state's motion, alleging that the claim was not "ripe" for review. These distinguishing factors define the

parameters of the narrow rule fashioned by the court below, and in no way conflict with the rule set out in Medina. The Fifth Circuit agreed, holding that a prisoner could not file a second habeas petition raising a competency-to-be-executed claim because, unlike Mr. Martinez-Villareal, he had not attempted to litigate his claim on his first habeas petition. In re Davis, 1997 W.L. 534153 (5th Cir. Aug. 27, 1997). The Fifth Circuit found that this fact distinguished Martinez-Villareal from Medina and its own case.

Other appellate courts have reached the same conclusion as the court below under analogous circumstances. Reeves v. Little, No. 87-741, 1997 WL 459783, *3 (10th Cir. Aug. 13, 1997)(where prior petition alleging state court delay in processing criminal direct appeal was dismissed without prejudice after federal court determined that petitioner was not prejudiced by delay, next petition raising claims following exhaustion of state court remedies was not a second or successive petition within amended § 2244(b)'s prohibition); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997)(where prior petition was dismissed without prejudice to exhaust state court remedies, next petition was not second or successive within meaning of amended § 2244); Christy v. Horn, 115 F.3d 201, 208 (3rd Cir. 1997)(petition filed after earlier

petition dismissed without prejudice to exhaust state court remedies is not a second or successive petition under amendments to §2244); In re Turner, 101 F.2d 1323 (9th cir. 1997)(same); Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996)(same); Benton v. Washington, 106 F.2d 162, 164-65((7th Cir. 1996) (where first petition dismissed for failure to pay filing fee, next petition was not second or successive under amended § 2244); Camarano v. Irvin, 98 F.3d 44, 46-47 (2nd Cir. 1996)(petition filed after earlier petition dismissed without prejudice for failure to exhaust state remedies is not a second or successive petition under amended § 2244). See also In re Vial, 115 F.3d 1192, 1195 n.6 (4th Cir. 1997)("The parties do not dispute that the meaning of `second or successive' is the same under the AEDPA as under prior law.")(citations omitted). All of these courts concluded, as did the Court of Appeals here, that the terms "second or successive" retain the same meaning under the AEDPA amendments, as they did before the amendments, Reeves v. Little, supra, at *2; In re Gasery, 116 F.3d at 1052; Benton v. Washington, 106 F.3d at 164; Camarano v. Irvin, 98 F.3d at 46; Martinez-Villareal v. Stewart, 118 F.3d 632-33, and that prior claims dismissed without prejudice in an earlier petition are not "second or

successive" claims under § 2244(b).[6]

As these appellate courts all found, the historical meaning of "second or successive" petition was not changed by the AEDPA amendments. In re Gasery, 116 F.3d at 1052; Martinez-Villareal v. Stewart, 118 F.3d at 632-633; Christy v. Horn, 115 F.3d at 208; Camarano v. Irvin, 98 F.3d at 46-47. A claim raised in a prior petition that is dismissed without prejudice has "no preclusive effect on subsequent petitions." Camarano v. Irvin, 98 F.3d at 47. See Schlup v. Delo, 115 S.Ct. 851, 863 n.34 (1995)("`successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition"); Sawyer v. Whitley, 505 U.S. 333, 348 (1992)(claim is "successive"

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[6]Other circuits have avoided inequitable results in circumstances similar to this case by declining to apply the AEDPA to situations where it would upset settled expectations, in violation of retroactivity principles. This Court was aware that "there may well be difficult issues, and it may be that application of Landgraf's default rule will be necessary to settle some of them." Lindh v. Murphy, 117 S. Ct. 2059, 2064 (1997). Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994), prohibits, absent clear Congressional intent, the application of a new statute which "attaches new legal consequences to events completed before its enactment." Thus, in Burris v. Parke, 95 F.3d 465 (7th Cir. 1996), the court held that the AEDPA did not apply retroactively to bar a second habeas petition where the state had "mousetrapped" a petitioner into believing that he would be able to raise certain claims in a subsequent habeas petition. The same observation could be made of the state's conduct in this case.

because "it was rejected on the merits in ... first petition").

The claim at issue here was not rejected on the merits. At Petitioners' request, it was dismissed without prejudice to be litigated after Mr. Martinez-Villareal's other claims had been resolved and his execution was imminent. It is not a successive claim under old or new law.[7]

Moreover, no legislative history supports Petitioners' contention that the Court of Appeals "rewrote" the statute to reach its result. There is no evidence that Congress intended to preclude litigation of claims that were raised in a prior petition but could not be adjudicated either as a result of the

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[7]Indeed, Petitioners failure to challenge the final judgment dismissing the competency claim "without prejudice" settles the issue under the law of the case doctrine. "Under the law of the case doctrine, a decision on an issue of law made at one phase of the litigation becomes a binding precedent to be followed in successive stages of the same case." Ulmet v. United States, 17 Cl. Ct. 679, 689 (U.S.Cl. Ct. 1989), aff'd, 935 F.2d 280 (Fed. Cir. 1991). The law of the case doctrine "binds every court to honor the rulings in the case by superior courts." Casey v. Planned Parenthood of Pennsylvania, 14 F.3d 848, 855 (3rd Cir. 1993). Mr. Martinez-Villareal's right to plenary federal review of his competency-to-be-executed claim was explicitly reserved in the mandate of the Ninth Circuit Court of Appeals. Petitioners did not avail themselves of any of the procedures for seeking timely and orderly review of that aspect of the ruling of the court below. Instead, they waited for the issuance of a warrant for Mr. Martinez-Villareal's execution, and at the eleventh hour raised this defense, based on the new provisions of the AEDPA, for the very first time.

nature of the claim (it was not exhausted or was premature), or as a result of a state's insistence that the claim should not be litigated until a later petition is filed. See Camarano v. Irvin, 98 F.3d at 46. This claim was not dismissed as a result of any dilatory or negligent action on Mr. Martinez-Villareal's behalf. It was dismissed on Petitioners' motion because it was determined to be premature.

B. The Equities Do Not Favor Petitioners

Petitioners come to this Court with unclean hands. Throughout this litigation, Petitioners have taken shifting and inconsistent positions in different courts, in order to get a procedural advantage over this mentally retarded, mentally ill, illiterate, indigent capital defendant. They ultimately defeated his claim of ineffective assistance of counsel, after shifting their positions with regard to state procedural default issues several times. They told the District Court and the Court of Appeals that the competency issue was not ripe and could be adjudicated later, and then stood mute and never notified the courts below of their intention to change their position in light of the newly amended law, until the District Court had issued a final order dismissing the first petition in reliance on their previous position. They argued to the Court of Appeals below

that the writ had not been suspended because this Court retained the ability to examine Mr. Martinez-Villareal's competency under 28 U.S.C. § 2241, but now have told this Court the opposite as they bring the case here.

In contrast, Mr. Martinez-Villareal has done nothing to disentitle him to the relief provided below. This is not a case where a habeas petitioner seeks to litigate on a second habeas petition an issue omitted from a first one. In fact this case presents the antithesis of the kind of delay with which Petitioners accuse the lower courts. Mr. Martinez-Villareal's counsel have done everything possible to bring the problem of Mr. Martinez-Villareal's incompetence to every court with jurisdiction to hear it, at the earliest possible date.

There is no basis for equitable intervention here. The Court of Appeals has done nothing more than provide Petitioners what they asked for under the unique circumstances of this case, and in accordance with the AEDPA amendments. See also Burris v. Parke, 955 F.3d at 468(where petitioner "moustrapped" into believing that the issue he raised in his second federal petition could be heard by the federal court, state estopped from pleading prohibition against fiing of second petition). The Court of Appeals decision was neither incorrect nor extraordinary. The

result of its action was not unjust. The equities of this case, based on the conduct of the parties below, favor Mr. Martinez-Villareal, and not the circumvention of Congress' limitation of this Court's jurisdiction that the Petitioners seek.

III. CONCLUSION.

The Combined Alternative Petition should be dismissed or denied.

Dated this 17th day of September, 1997.

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EXHIBIT A

FILED

JUN 30 1997

JUN 25 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL, Petitioner, v. TERRY STEWART, Respondent.	Nos. 94-99011, 94-99012, 97-80229, 97-99009 D.C. No. CV-86-00296-RMB ORDER

Before: D.W. NELSON, LEAVY, and T.G. NELSON, Circuit Judges.

Petitioner's "'Second' Petition for Rehearing with Suggestion for Rehearing En Banc," filed on June 6, 1997, is DENIED as moot, in view of our Order filed on June 23, 1997, in docket numbers 97-80229 and 97-80249.

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

I hereby certify that on this 17th date of September, 1997, a copy of the Brief in Opposition To Combined Alternative Petition for Statutory Writ of Certiorari or For Extraordinary Writ (Mandamus, Prohibition, or Common Law Writ of Certiorari) was served on all parties required to be served by depositing a copy in a United States mailbox, first class postage prepaid, and addressed to counsel for Petitioners:

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Supreme Court, U.S.
FILED
SEP 23 1997
CLERK

(4)

No. 97-300

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, and GRANT WOODS, ARIZONA ATTORNEY GENERAL,

PETITIONERS,

-VS-

RAMON MARTINEZ-VILLAREAL,

RESPONDENT.

COMBINED ALTERNATIVE PETITION FOR STATUTORY WRIT OF CERTIORARI OR FOR EXTRAORDINARY WRIT (MANDAMUS, PROHIBITION, OR COMMON LAW WRIT OF CERTIORARI) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO COMBINED ALTERNATIVE PETITION

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REASONS WHY A WRIT SHOULD ISSUE

I

THERE ARE SATISFACTORY JURISDICTIONAL BASES ENABLING THE COURT TO REVIEW THIS CASE.

Contrary to the jurisdictional objections posed by the Brief in Opposition (hereafter "BOP"), the Court's basis for review is solid.

A. CERTIORARI JURISDICTION (BOP AT VII–IX).

Petitioners assert that 28 U.S.C. § 2244(b)(3)(E) does not preclude certiorari review in this case because the Ninth Circuit explicitly concluded that Respondent's claim "is not subject to the restrictions imposed by § 2244(b)," and dismissed his motion for authorization of a successive petition as "unnecessary." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 634 (9th Cir. 1997). Respondent wholly misses the point by treating this as an argument about the semantics of "dismissed" as opposed to "denied." What is critical is what the court of appeals *did*, not how it expressed itself. That court neither granted nor denied authorization for a successive petition (so it made no "authorization decision," as Respondent refers to it), but held that Respondent's petition should not be considered "successive" at all (that being the factor which triggers all of "the restrictions imposed by § 2244(b)"). Respondent cannot have it both ways; if he wishes to benefit from the Ninth Circuit's conclusion that his is not a successive petition, he must equally accept that the restrictions on review apply only to *successive* habeas applications.[1]

Moreover, certiorari jurisdiction exists even if what the Ninth Circuit did is regarded as an "authorization decision," because the opinion does not merely adjudicate Respondent's individual

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1. That certiorari was not *sought* in other cases obviously does not show that the respondents in those cases "knew no jurisdiction existed." (BOP at viii.) There being no record of the reasons for not seeking certiorari, no conclusions can be drawn.

application. Instead, it set up in pseudo-legislative fashion procedures which the court demands to be followed by *every* applicant presenting a claim of incompetency for execution. 118 F.3d at 634. Because the court of appeals opinion was based on the claimed compulsion of constitutional violations occurring whenever the statute is applied as written to such claims, it plainly is the constitutionality of the statute as a whole, and not just the "non-authorization authorization" of Respondent's "non-successive successive" petition, which is in issue here. As discussed in the Petition at 22–24, this Court has repeatedly held that it possesses authority to review the general validity of statutory schemes even when there are prohibitions against review of individual determinations made pursuant to those statutes. *See, e.g., Johnson v. Robinson*, 415 U.S. 361 (1974), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). "Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 2172 (1997). Therefore, this Court clearly possesses jurisdiction by means of statutory certiorari, 28 U.S. C. § 1254(1), to review this case.[2]

B. JURISDICTION BY EXTRAORDINARY WRIT (BOP AT IX–XII).

As previously shown, this Court does possess jurisdiction to review this case by means of "statutory" certiorari. Hence, it should not be necessary for the Court to deal with the complexities

2. Respondent's attempt to distinguish *Johnson v. Robison* and *McNary v. Haitian Refugee Center* (BOP at ix n.1) is unpersuasive. First, the ultimate question is whether a statute which purports to preclude judicial review of individual "benefit" determinations also forecloses judicial consideration of the constitutionality of the statutory scheme as it relates to a whole class of claimants, and Respondent fails to show why, in such comparable circumstances, a judicial determination of how to apply a statute should be treated differently from the agency determinations of how to apply statutes which were considered in those cases. Second, that this Court determined the facial constitutionality of this statute in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996), does not preclude review of this case. At issue now is the Ninth Circuit's ruling that the statute cannot be constitutionally applied as written to a particular class of habeas cases, and the fact that Petitioners happen to be supporting rather than denying the constitutionality of the statute is irrelevant.

of jurisdiction *via* extraordinary writs. However, assuming *arguendo* that jurisdiction by ordinary certiorari is unavailable, the Court certainly should exercise extraordinary writ jurisdiction of whichever sort it deems most appropriate to hear this case.

Section 1651(a), 28 U.S.C., as explicated by Supreme Court Rule 20, requires that, for the extraordinary writs to issue: (1) such action must be in aid of this Court's appellate jurisdiction; (2) exceptional circumstances must exist which warrant the exercise of this Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court. The Petition at 25–28 showed that all three of these considerations exist in this case. Respondent disagrees, but he is wrong.

The crux of Respondent's error is his perception that, because the "ultimate disposition" of his competency claim can eventually be reviewed by this Court by means of ordinary certiorari, the three factors are all absent and issuance of a writ is not appropriate. He misunderstands what is at stake here. Enactment of § 2244(b) conferred on Petitioners a valuable right, not to be burdened with repetitive litigation except under the circumstances specified by the statute. Regardless of whether Petitioners eventually win or lose on the merits of Respondent's specific claim, they have already "lost," in a manner incapable of being remedied by a subsequent appeal. Thus, a close analogy exists to the cases in which this Court has permitted interlocutory appeals of "collateral orders," because "the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial'." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498–500 (1989) (listing criminal and civil cases authorizing immediate appeals because the deprivation of a right not to be subjected to trial is effectively unreviewable after trial and final judgment).

It therefore is clear that all of the factors necessary for the issuance of an extraordinary writ *do* exist here. Adequate relief cannot be obtained from any other court because only this Court can remedy the Ninth Circuit's action. Adequate relief cannot be obtained in any other form, and the action would indeed be in aid of this Court's appellate jurisdiction, because this is the only possible mode of redress for the deprivation of Petitioners' right not

to have to litigate a successive habeas proceeding. In short, an extraordinary writ issued now would aid the Court's appellate jurisdiction because without it there will be no appeal that this Court can meaningfully consider later.[3] The sort of "exceptional circumstances" are present which render issuance of a writ appropriate is shown by the close parallel between this case and *De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945), in which this Court found appropriate the issuance of an extraordinary writ. Thus, if statutory certiorari is unavailable, another writ certainly should issue.[4]

II

THE ISSUES IN THIS CASE WARRANT REVIEW.

Respondent offers several reasons why the Court should not grant review, none persuasive. His argument that the Court lacks jurisdiction was refuted above. His second contention, that the court of appeals' decision does not really present a Suspension Clause issue (BOP at 14), simply blinks reality. The majority of that court avoided the Suspension Clause issue only by reconstructing the Act. *Martinez-Villareal v. Stewart*, 118 F.3d at 631–34. Thus, it created a remedy for a *presumed* Suspension Clause violation. However, only the existence of an *actual* violation might have permitted the statutory manipulation in which it engaged. Moreover, the concurring judge specifically concluded that, "the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims," but agreed that allowing the successive petition to be heard remedied the supposed

3. Contrary to Respondent's repeated contention, it is *not* mere delay about which Petitioners are complaining, but the effective extinguishment of their right, conferred by the 1996 Act, not to have to defend against successive petitions.

4. The Court should not be deterred from issuing a writ because the Ninth Circuit judges were not served. (BOP at ix–x.) The judges were named as required by Rule 20.3(a)—Petition at ii. It is not clear on its face that Rule 20.3(b) requires such service, since the judges were not "part[ies] to the proceeding with respect to which relief is sought," the case which they decided. No materials from the Clerk's Office suggested that additional notifications were necessary. No authority is offered that, if there was an error in this regard, it is grounds for rejecting an otherwise meritorious petition.

violation. *Id.* at 635. A Suspension Clause issue *is* present in this case.

Having blithely dismissed the constitutional question, Respondent argues that the Ninth Circuit's transmutation of the statute really is nothing to be concerned about. However, the Ninth Circuit's wishful thinking, that its ruling is a narrow one, inherently limited by the nature of competency for execution claims (BOP at 14–15), has already proved incorrect. *Martinez-Villareal* has now been cited as support for permitting the filing of a successive 28 U.S.C. § 2255 motion, to litigate ineffective assistance of counsel claims under another set of "unique" circumstances. *United States v. Scott*, 1997 WL 561231 at *3 (10th Cir. Aug. 26, 1997). It thus appears that the circumstances will be deemed "unique" and the plain language of the statute disregarded whenever a successive habeas petitioner can find sympathetic judges. Such chancellor's-foot adjudication contradicts this Court's insistence that the "equitable" nature of habeas corpus does not authorize any court to ignore applicable statutes and rules. *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1298 (1996).

Moreover, even if the Ninth Circuit's holding could be cabined to "only" competency for execution claims, that would not mean that an insignificant number of cases would be affected. This Court has repeatedly noted the unique susceptibility to abuse of the claim of incompetency for execution. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986) (dissenting opinions of Justices O'Connor and Rehnquist); *Solesbee v. Balkcom*, 339 U.S. 9, 12–13 (1950) (discussing cases). Since such assertions are easily manufactured, and can be made up to the instant of execution, they surely will become the claim of last resort in thousands of death penalty cases, and leaving this case unreviewed will only exacerbate the problem. Since the opinion was issued, efforts have already been made to add claims of incompetency for execution in numerous Arizona capital habeas cases, including ones where no complaints of mental problems had been raised before.[5] An attempt to obtain relief based

5. The Arizona Federal Public Defender Office, where the author of

(continued...)

on *Martinez-Villareal* was recently made in a Texas capital case. *In re Davis*, 1997 WL 534153 (5th Cir. Aug. 27, 1997). Thus, its pernicious effects are already spreading, and will continue to do so unless this Court puts a stop to it.

Respondent's next ploy to disinterest the Court is to claim that no real split exists between *Martinez-Villareal* and *In re Medina*, 109 F.3d 1556 (11th Cir. 1997). This assertion flies in the face of the Ninth Circuit's own recognition that its opinion contradicts *Medina* regarding whether the Act's restrictions on successive petitions apply to "original" habeas petitions filed in this Court. See 118 F.3d at 632 and n.4. It also expressly contradicts *Medina* on whether review by certiorari is sufficient to remove any Suspension Clause problems. *Id.* at 631 and n.3. The end result of these differences was, of course, the Ninth Circuit's conclusion that it was necessary to rewrite the statute so that it would not apply to competency for execution claims, which is completely at odds with *Medina*. Moreover, the circuit split has deepened with the Fifth Circuit's decision in *In re Davis, supra*. Contrary to Respondent's assertion, *Davis* holds that a competency for execution claim can be presented (despite being successive) to this Court in an "original" habeas petition. 1997 WL 534153 at *5. *Davis* further disagrees with the Ninth Circuit by concluding that an "equitable exception" to § 2244(b)'s limitations on successive petitions cannot be devised out of whole cloth in order to permit lower federal court consideration of a competency for execution claim, and rejects the idea that there is a Suspension Clause problem. *Id.*, adopting the *Medina* reasoning. Thus, as time goes on, the inter-circuit division only widens, so that wildly inconsistent results will certainly occur in legally indistinguishable capital cases—unless this Court decides the question.

Finally, Respondent attempts to hide the deviant character of the decision in this case by asserting that numerous other courts "have reached the same conclusion as the court below under analogous

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(...continued)

Respondent's brief supervises the capital defense section, has sought to inject such claims into habeas proceedings involving, *e.g.*, Jeffery Timothy Landrigan and Richard Michael Rossi.

circumstances." (BOP at 17-20.) However, the cases cited by Respondent are *not* analogous, because they all involved habeas petitions which were dismissed without prejudice at an early stage (for lack of complete exhaustion, procedural defects, etc.), so that there had been no significant expenditure of effort by the parties or the courts. Here, by contrast, some 30 issues, other than Respondent's competency for execution, were strenuously litigated in both the district court and the court of appeals (with a detour through the Arizona courts) from 1991 to 1996, including a 2-day evidentiary hearing, two rounds of briefing, and lengthy oral argument. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). For this very reason, the specially concurring judge below rejected the spurious analogy argued by Respondent and adopted by two other judges: "the earlier petition had no practical or legal effect, [so] it was appropriate to simply ignore it," but such reasoning could not, in this case, "justif[y] our ignoring several years of litigation in the federal courts." *Martinez-Villareal v. Stewart*, 118 F.3d at 635. Legal rules should not be extended beyond the circumstances giving rise to them; "*Cessante ratione legis, cessat et ipsa lex.*" *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993). Since the sort of circumstances which supposedly warranted ignoring the successiveness of the petitions in those other cases do not exist here, those decisions cannot support the ruling here, and should not dissuade the Court from granting review.[6] Thus, Respondent has not mustered a single meaningful argument against reviewing this case.

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6. Indeed, to the extent that the cases relied upon by Respondent reflect a widespread willingness by the lower courts to engage in creation of "equitable exceptions" to the plain language of the Act, which was discountenanced by *In re Medina* and *In re Davis*, it argues strongly in favor of review by this Court, to show that such activity is not permissible under *Lonchar*.

III

THIS COURT SHOULD NOT REWARD RESPONDENT'S MISLEADING TIRADES ABOUT PETITIONERS' CONDUCT OF THIS CASE BY DECLINING TO REVIEW IT.

It is a lamentable fact that Respondent's brief is larded with half-truths and whole errors, clearly designed to appeal to emotion by painting Petitioners as deceitful and bloodthirsty litigators who, for example, "have taken shifting and inconsistent positions in different courts in order to get a procedural advantage over this mentally retarded, mentally ill, illiterate, indigent capital defendant." (BOP at 21.) A Reply of permissible length probably would be insufficient, even if devoted entirely to the task, to fully expose the misleading statements in Respondent's brief. Therefore, only a few will be addressed, in the hope that the Court will recognize the pattern and reject Respondent's subterfuge.

1. Respondent (who, though indigent, has always been represented by counsel) had ample opportunity to develop his claim. Contrary to the BOP at 1, counsel for Respondent did not encounter "much resistance" in getting Respondent's prison medical records, just a request from Department of Corrections personnel that he comply with standard operating procedures; counsel for Petitioners assisted him in obtaining the records. The Director of DOC declined to seek a competency hearing under the pre-1993 statute (BOP at 2) because a recent evaluation by a psychiatrist and a psychologist indicated there was no reason to question Respondent's competency. Although Petitioners' counsel pointed out the availability of such a mechanism under Arizona law, Respondent's counsel declined to seek judicial involvement in the manner approved by *Phyle v. Duffy*, 334 U.S. 431 (1948). After the statute was amended to provide for virtually automatic judicial hearings, Respondent requested and received one, involving 4 days of testimony. Several of Respondent's experts did testify concerning retardation; the request for yet another one (BOP at 7) was denied because it was late, the proposed witness was on the east coast, and no showing was made that he could contribute anything helpful. The MRI was denied because Respondent's own witness

acknowledged that it would not assist the court in determining competency, and the special EEG requested was of a sort previously found by several courts not to be generally accepted within the medical profession. That Respondent received fair consideration of his competency for execution is shown by the fact that he did not even bother to raise any of the quibbles he now presents in his certiorari petition concerning the competency determination (No. 96-9068).[7]

2. Although Respondent presents it as absolute fact, it actually was heavily disputed among the experts whether (or to what degree) he is retarded, brain-damaged, or mentally ill. Judge Bilby's qualms expressed about Respondent's competency in 1997 (BOP at 10-11) were based solely on a hearing held in 1994. Testimony in the 1997 state court hearing (which Judge Bilby had not seen) revealed that Respondent had "scammed" Judge Bilby, by intentionally altering his appearance and behavior for that hearing, and then reverting to normalcy afterward. The dubiety expressed by Arizona Supreme Court Justices Zlaket and Feldman, and trial court judge Montiel (BOP at 11-12), was based on the demonstrably inaccurate remarks by Judge Bilby.

3. Petitioners have never sought to take improper advantage of Respondent. To the extent that their position did change, it was because the law unexpectedly changed, in the 1996 Act. Respondent repeatedly castigates them for contending in 1993 that his competency claim was then unripe, but never even attempts to show that that position was legally incorrect, or how the district court could properly have considered the claim at that point. The statutory amendments were enacted after the Ninth Circuit's original decision in this case, and so could not be considered in that context. Petitioners "said nothing" regarding Respondent's motion asking the district court to reconsider the judgment it issued in compliance with

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7. The Court's file in that case (Pet. App. B) also shows that Respondent has severely truncated the trial court order discussed in his current Brief at 8. He has omitted the trial court's findings that there was credible evidence that Respondent was malingering—either does not suffer at all from the various maladies claimed, or suffers from them to a lesser degree than claimed—and that he had not proved incompetency by *any* standard, not even by a mere preponderance of the evidence.

the Ninth Circuit's mandate (BOP at 5-6, 21) because Arizona District Court Rule 1.10(p) forbids responses to motions for reconsideration unless specifically ordered by the court.

This list could go on and on, but the Court surely understands what Respondent attempted to do here. The revered Arizona Congressman, Morris Udall, reportedly quipped that, "He who throws mud, loses ground." The Court should validate that observation by disregarding Respondent's shameless mishandling of the record in this case.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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CRM86-0720
[14802]

Supreme Court, U.S.
FILED
SEP 17 1997
CLERK

(2)

No. 97-300

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., *Petitioner*,

v.

RAMON MARTINEZ-VILLAREAL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

Whether Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the Act) violates the Suspension of the Writ Clause insofar as it effectively bars the exercise of federal habeas corpus jurisdiction over competency to be executed claims.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996
No. 97-300

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., *Petitioner*,

v.

RAMON MARTINEZ-VILLAREAL, *Respondent*.

INTEREST OF AMICUS CURIAE

Amicus, the State of California, is responsible for defending presumptively valid state judgments, including 481 death penalty judgments, against federal habeas corpus challenges. It is reasonable to expect the issue of present competency to be executed to arise repeatedly. Here, the question is squarely presented as to whether Congress could exercise its plenary power to limit or withdraw the habeas corpus jurisdiction of the federal courts over competency to be executed claims without running afoul of the Suspension of the Writ Clause. Amicus respectfully urges issuance of the writ to answer this question.[1]

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1. This brief is submitted in support of the petition for certiorari by amicus through its Attorney General in accordance with Rules 37.2 and 37.5 of the Rules of the United States.

ARGUMENT

The Writ Should Issue So That This Court Can Resolve The Question Of Whether Congress Enjoyed The Power Under Article III To Withdraw Federal Habeas Corpus Jurisdiction Over Competency To Be Executed Claims Without Infringing On The Suspension Of The Writ Clause

As members of this Court remarked just last term,

> "The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . ." Given the fact that the Members of Congress are elected by the People of the several States, with each State receiving an equal number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents.

Printz v. United States, ___ U.S. ___, 117 S.Ct. 2365, 2394 (1997) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, J.J.) (*quoting Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-551 (1985), internal citations omitted).

When Congress passed, and the President signed, the Act, the Federal Government chose to enhance the integrity, vitality, and finality of state laws and judgments in sections 103, 104, and 106 of the Act by limiting the habeas corpus jurisdiction of the federal courts. And, as members of this Court indicated as recently as last term, habeas corpus jurisdiction can rise or fall via congressional enactment. *See Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 2071 (1997) (Rehnquist C.J., joined by Scalia,

Kennedy, and Thomas, J.J.). However, this begs the question of how much Congress can restrict the habeas corpus jurisdiction of the federal courts without running afoul of the Suspension of the Writ Clause.[2]

In *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333 (1996) this Court observed that, in ascertaining whether the Act's new restrictions on second or successive petitions violated the Suspension Clause, it would "assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.*, at 2340. However, even after having made this assumption, this Court nonetheless reaffirmed that judgments about the proper scope of the writ are "'normally for Congress to make.'" *Id.* (*quoting Lonchar v. Thomas*, 517 U.S. ___, 116 S.Ct. 1293, 1298 (1996)).[3]

Established notions of the separation of powers and federalism at the heart of Congress's Article III power to grant or withdraw federal jurisdiction would militate in favor of an extremely broad and expansive interpretation of that power vis-a-vis the Suspension Clause. And, as both the Fifth and Eleventh Circuits have effectively recognized, such a broad and expansive interpretation would be especially appropriate where the States have afforded process for the adjudication of a claim such as competency to be executed which this Court may in turn

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2. The Suspension of the Writ Clause is located in Article I, section 9, clause 2 of the Constitution. That clause provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

3. In *Felker*, this Court concluded the newly-imposed restrictions in the Act as to second or successive petitions generally passed constitutional muster under the Suspension Clause because these restrictions fell within the "compass of the evolutionary process" for handling such petitions. *Felker*, 116 S.Ct. at 2340.

review via its certiorari power. *See In re Davis*, ___ F.3d ___, 1997 WL 534153, *5 (5th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1556 (11th Cir. 1997).

Article III of the Constitution states in relevant part that the "appellate jurisdiction" of this Court, and of those "inferior Courts" established by Congress, is subject to definition by Congress, which is empowered to make "such Exceptions and . . . such Regulations," as Congress deems fit. Art. III, § 2, cl. 2. Construing Article III, this Court has found that "[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (internal citations omitted). From this construction of Article III has evolved what the Ninth Circuit labels "[t]he black letter law on federal subject matter jurisdiction." *In re Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995).

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and that the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (per curiam) (internal citations omitted).

In part, this construction of Article III reflects quintessentially important separation of powers concerns regarding the demarcation of the legislative and judicial spheres of authority. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807-810 (1985) (Article III grant of power to the federal courts to hear "federal questions" is not "self-executing" such that the federal

courts's jurisdiction to hear such cases in fact derived from a "more limited" congressional statute).

However, this construction of Article III also reflects equally venerable and fundamental concerns regarding the sovereign rights of the States to carry out their local affairs by enacting and implementing their own laws and rules. As this Court has observed, the striking of the federal-state balance is our Framers's "unique contribution" to political science and theory because of their insight that "freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 549, 575-576 (1995) (Kennedy, J., concurring, joined by O'Connor, J., concurring); *see also id.*, at 552 (majority opinion). It has therefore become well-embedded in the political and legal fabric of our Nation that "'[t]he powers delegated by the . . . Constitution to the federal government are few and defined. Those which . . . remain in the State governments are numerous and indefinite.'" *Id.*, at 552 (*quoting* The Federalist, No. 45, pp. 292-293 (C. Rossiter ed. 1961)).[4]

This Court repeatedly has been called upon to adjudicate this federal-state jurisdictional line. *See, e.g., Printz*, 117 S.Ct. at 2376-2378; *City of Boerne v. Flores*, ___ U.S. ___, 117 S.Ct. 2157, 2162-2166, 2170-2172 (1997); *Idaho v. Coeur d'Alene*, ___ U.S. ___, 117 S.Ct. 2028, 2033-2034, 2040-2043 (1997); *see also id.*, at 2035-2040 (lead opinion of Kennedy, J., joined by Rehnquist, C.J.); *Arkansas v. Farm Credit Services of Cent. Ark.*, ___ U.S. ___, 117 S.Ct. 1776, 1780-1782 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S.Ct. 1114, 1127-1132 (1996).

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4. Indeed, this Court has shown a great solicitude for the state judiciary. "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. 227, 241 (1989).

Here, the question presented to this Court for issuance of the writ takes on a special hue in that Congress has chosen in the Act to use its plenary Article III power to vindicate state sovereignty interests vis-a-vis the federal courts. *Cf. Farm Credit Services*, 117 S.Ct. at 1780 (showing special sensitivity to Congress's jurisdictional line-drawing against federal court intervention in state taxation questions). The Suspension Clause has never been viewed in historical or modern times as any substantial impediment to Congress's plenary exercise of its Article III power to restrict federal habeas corpus jurisdiction.

Recognizing the extremely limited role of the habeas corpus writ as it was understood by the Framers in 1789 when they drafted our Constitution, no less an authority than Chief Justice Marshall explained, "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Ex Parte Bollman*, 8 U.S. (4 Cranch) 74, 93-94 (1807).[5]

Even after the Civil War, in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), this Court held that Congress could by statute withdraw this Court's appellate jurisdiction over habeas petitions filed under the Habeas Corpus Act. "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words." 74 U.S. (7 Wall.) at 514. And, more recently, Justice Brennan urged in *Wainwright v. Sykes*, 433 U.S. 72 (1977) that "Congress, as the primary

5. A comprehensive discussion of the extremely limited role of the writ as the Framers understood it in 1789, and, consequently, as it exists today, is contained in the petition for certiorari itself. *See* Pet. for Cert., at 13-19.

expositor of federal court jurisdiction, remains free to undo the potential restrictiveness of today's decision [applying a cause and prejudice standard to excuse state procedural default] by expressly defining the standard of intervention under 28 U.S.C. §2254." *Id.*, at 101 n.2 (Brennan, J., dissenting, joined by Marshall, J.); *see also Lindh*, 117 S.Ct. at 2071 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, J.J.) (viewing the Act's new deferential standard of review of state court judgments as a jurisdictional limitation).

Not only does the Ninth Circuit opinion below fail to take account of the extremely limited scope of the Suspension Clause as it was understood by the Framers who drafted it in 1789, but it represents a significant departure from the fundamentals of federal subject matter jurisdiction. Especially in the context of habeas corpus law, these fundamentals have been applied without much dissension for over two hundred years. Until now.[6]

6. It may be helpful in the end to view federal habeas corpus in an alternative light as a partial repeal of the full faith and credit normally accredited to state court judgments. *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation In Support of Respondent In *Lindh* v. *Murphy* (No. 96-6298), 1997 WL 126132, *7; *Matsushita Elec. Indus. v. Epstein*, 516 U.S. ___, 116 S.Ct. 873, 876 (1996). If federal habeas corpus is viewed in that light, then the Act amounts to nothing more than a partial regrant of full faith and credit to state court judgments. State court judgments can always be reviewed by this Court via its certiorari power such that according them full faith and credit is appropriate.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court grant the petition for certiorari.

Dated: September 16, 1997.

Respectfully submitted,

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Counsel for Amicus Curiae

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Supreme Court, U.S.
FILED
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No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 18, 1997
Certiorari Granted October 14, 1997

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, -vs- SAMUEL A. LEWIS, et al., Respondents.	CIV 86-296-TUC-RMB MOTION FOR SUMMARY JUDGMENT (Filed July 30, 1993)

Pursuant to Rules 5 and 11 of the Rules Governing § 2254 Cases, and Rule 56(b) of the Federal Rules of Civil Procedure, Respondents oppose Petitioner's Amended Petition for Writ of Habeas Corpus and request that this Court dismiss the amended petition because it fails to state a claim upon which relief can be granted, there are no genuine issues of any material fact, and Respondents are entitled to judgment as a matter of law. This response is based on the following Memorandum of Points and Authorities.

DATED this 30th day of July, 1993.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/s/Bruce M. Ferg

BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENTS

* * *

101. Competency To Be Executed.

It is asserted that Petitioner lacks the mental capacity necessary for him to be constitutionally executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). It appears that this claim is not ripe for adjudication. A prisoner cannot be executed in Arizona except pursuant to a warrant issued by the Arizona Supreme Court. Arizona Rule of Criminal Procedure 31.17 provides:

> **c. Fixing the Date of Execution After a Death Sentence is Affirmed.** When a conviction and sentence of death is affirmed, the Supreme Court shall fix the time for execution of the sentence and shall issue a warrant to the superintendent of the state prison directing him to execute the sentence. The superintendent shall make a return on the warrant to the Supreme Court showing the manner and time of execution.

There is no execution warrant outstanding with regard to Petitioner. There is, however, a stay of execution issued by this Court which is still in effect.

The Arizona Supreme Court appears to be applying Criminal Rule 31.17(c) in such a way that no warrant for execution will issue while a federal court stay is in effect. Thus, after James Clark's lengthy habeas corpus litigation was concluded by the denial of a petition for certiorari, the State filed a motion for issuance of an execution warrant. (Exhibit A hereto.) However, Clark's counsel objected that a District Court stay of execution was still in effect because the Ninth Circuit's formal mandate had not yet been issued. (Exhibit B.) The Arizona Supreme Court refused to issue the warrant because of the existence of the stay. (Exhibit C.) After the Ninth Circuit mandate issued, effectively dissolving the stay, the State renewed its motion for the issuance of a warrant, and only then was the warrant issued. (Exhibits D, E.)

Before a federal court can consider a legal claim, there must be a "case or controversy" under Article III of the Constitution. *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 1722, 109 L. Ed. 2d 135 (1990).

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," *Warth, supra*, 422 U.S., at 501, 95 S.Ct., at 2206, as opposed to merely "[a]bstract," *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974), and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1664-1665, 75 L.Ed.2d 675 (1983).

110 S. Ct. at 1723. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* at 1724-25. However, "It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Id.* at 1725. The Art. III requirements will not be relaxed just because litigation involves the death penalty. *Id.* at 1726.

In sum, Petitioner is not now facing and will not face execution for the foreseeable future. No warrant of execution can be expected to issue during the pendency of this habeas litigation, which in all likelihood will be a matter of years. Although Petitioner has a right not to be executed while incompetent, he is not now looking at an actual execution date, and competency is obviously a matter that can fluctuate over time. Therefore, his claim really is speculative and conjectural – a mere "possible future injury." Since such a claim is outside the jurisdiction of the Court, it must be dismissed. *Cf. Fernandez-Collado v. I.N.S.*, 644 F.Supp 741 (D. Conn. 1986), *aff'd without op.*, 857 F.2d 1461 (2d Cir. 1987) (habeas corpus petition denied because, although INS had detainer on petitioner, he could not be deported until after service of prison term, and hence was not yet in INS custody; therefore, his requested relief was not yet available). This Court cannot grant relief from a situation that may never occur. Only if a warrant for his execution issues, and if he still claims to be incompetent at that time, will there be a jurisdictionally sufficient case or controversy, and that will be the time to litigate the issue.

* * *

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. SAMUEL A. LEWIS, et al. Respondents.	No. CIV 86-296-TUC-RMB OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT (Filed November 2, 1993)

* * *

91. *Competency to stand trial.*

After arguing preclusion and abuse of the writ, topics which have been addressed elsewhere in this memorandum, respondents argue that petitioner is merely suffering from "prison psychosis" and is not and was not incompetent. (M.S.J. at 39). Respondents claim that, on the record, petitioner is not incompetent or insane, citing and quoting *Boag v. Raines*, 769 F.2d 1341 (9th Cir. 1985). (M.S.J. at 39).

Boag is distinguishable, however. In the first place, that case was the third appeal on the issue of incompetency, and the defendant's competency in *Boag* was substantively addressed, contrary to the position advocated by respondents herein. "In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trail [sic] if he presents sufficient facts to create a real and substantial doubt as to his competency, *even if those facts were not presented to the trial court*. *Boag*, 769 F.2d at 1343, *citing*, *Steinsvik v. Vinzant*, 640 F.2d 949, 954 (9th Cir. 1981) (emphasis added). Secondly, and more significantly, there was no professional psychologist's opinion presented in *Boag* that he was, in fact, incompetent. In the instant case, Dr. Geffen has unequivocally found that petitioner was incompetent. Finally, the issue of whether the petitioner's mental illness was presented in mitigation to the sentencing judge or whether he was not guilty by reason of insanity was not an issue in *Boag*, or at least the opinion does not address those concerns.

Respondents' argument ignores the fact that they tried everything in the book to prevent petitioner from being examined by an independent mental health expert. After first stressing that petitioner's claim to incompetence was an unexhausted claim, respondents then argued in state court that only by means of the statutory scheme set forth in A.R.S. § 13-4021 et seq. could petitioner's mental condition be inquired into. Since that was a ministerial duty, respondents argued, petitioner had no judicial remedy, and was dependent exclusively upon the warden's assessment of petitioner's competence. Needless to say the warden concluded that petitioner was

sane, despite a history of mental illness in prison, and years of being prescribed psychotropic medication by prison doctors notorious for not prescribing medicine for prisoners. The matter, according to respondents, was closed. Incredibly, the state superior court adopted the state's reasoning, despite the mandate of *Ford v. Wainwright*, 477 U.S. 399 (1986).

Upon return to federal court, respondents again zealously opposed the appointment of an independent mental health expert, this time on the grounds that the Arizona statute will change in 1994, and this court should wait and see what happens after the law changes. Respondents now argue a totally new theory in their motion for summary judgment, that the issue which forced this case back to state court, incompetence to be executed, is *not ripe*. (M.S.J. at 43). As that argument was never "exhausted" in state court, if anything should be precluded, it is that argument.

In conclusion, for respondents to have adamantly prohibited any meaningful review and evaluation of petitioner's mental health and now argue that the record is incomplete, and, therefore, that they win on summary judgment, is unfair, incorrect, and would amount to a gross denial of due process should it be granted. Only after a full and fair opportunity to examine and cross-examine those persons claiming to have expertise to make such a diagnosis can a just decision be made. Respondents' counsel is no more qualified to give such an opinion than petitioner's counsel. The difference is that petitioner's counsel never attempted to diagnose petitioner; he merely pointed out sufficient disturbing observations to merit further inquiry by mental health

professionals who could give expert opinions on the subject.

Respondents state that, "Claims asserting incompetence at trial are subject to preclusion on the basis of being abusive or procedurally defaulted, even when the petitioner faces a death sentence," *citing, Clanton v. Muncy,* 845 F.2d 1238 (4th Cir. 1988) and *Bainter v. Trickey,* 932 F.2d 713 (8th Cir. 1991). The facts of *Clanton* are distinguishable. The issue therein was whether a request for an "11th hour" stay of execution should be granted. The Court held that the claim was abusive since it was the same claim, under a different label, which had been substantively addressed on the merits in a prior habeas petition. The claim had to do with childhood abuse which was not brought out at sentencing. Having raised the claim before, and receiving a ruling on the merits, Clanton again tried to raise the same claim, this time under the label of incompetence during sentencing, claimaint [sic] that he failed to tell his attorney of the childhood abuse because he was incompetent. The *Clanton* case, therefore, is factually and procedurally distinguishable from the instant case.

Trickey was not a death penalty case, contrary to the apparent insinuation by respondents. Although it is true that *Trickey* held that the defendant's claim of incompetence was procedurally barred, respondents herein fail to point out that extensive evidence was taken in *Trickey* on the issue of whether his counsel was ineffective for failing to raise the competence issue. In that respect, *Trickey* favors petitioner's position herein.

* * *

101. *Competency to be executed.*

Comment has already been made herein as to the incredible position that respondents are now taking regarding this issue: that it is not ripe. Not only is this claim new and bizarre, but it would be unworkable. Nothing in the *Ford v. Wainwright, supra,* decision supports this leap in logic. In fact, the opposite is the only workable solution: if petitioner is incompetent now, he cannot be executed until he regains competency. To hold otherwise would place an incredible burden on the system. It is also interesting to note that the Arizona scheme set forth in A.R.S. § 13-4021 et seq., so championed by respondents up till now, has no such limitations as those now suggested by respondents.

Analogy can be made to the situation of a defendant found incompetent to stand trial. The competency determination is made at the outset, not the day of trial. If and when competency is restored, the trial proceeds. Similarly, if petitioner is presently incompetent to be executed, a finding needs to be made.

* * *

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL,	)	CIV 86-296-TUC-RMB
Petitioner,	)	REPLY TO RESPONSE
-vs-	)	TO MOTION FOR
SAMUEL A. LEWIS, et al.,	)	SUMMARY JUDGMENT
Respondents.	)	(Filed December 17, 1993)

Petitioner's Response, as demonstrated in the attached Memorandum, fails to prove any error in the Motion for Summary Judgment. Respondents therefore reiterate their request that this Court dismiss the petition because it fails to state a claim upon which relief can be granted, there are no genuine issues of material fact, and Respondents are entitled to judgment as a matter of law.

DATED this 17th day of December, 1993.

Respectfully submitted,

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Attorney General

/s/ Bruce M. Ferg
BRUCE M. FERG
Assistant Attorney General

Attorneys for RESPONDENTS

* * *

91. Alleged Incompetence To Stand Trial.

In the Petition it was asserted (based on little more than conclusory remarks about mental problems Petitioner allegedly has *now*) that he was incompetent to stand trial or be sentenced. (Petition at 40-41.) Respondents answered in several ways. First, it was argued that this claim should not even be considered on its merits, because it is both abusive (not having been presented in the first habeas petition) and procedurally precluded (having been defaulted by the failure to present it to the state courts at any time before the third Rule 32 petition). (Summary Judgment Motion at 36.) Attempting to defuse these preclusion arguments, Petitioner has tried to distinguish the decisions offered by Respondents as support for their position that claims of incompetency to be tried can be precluded, even in capital cases. He would like to limit *Clanton v. Muncy*, 845 F.2d 1238 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988), a capital case in which the federal court refused to reach the merits of a claim of incompetency at sentencing, to clearly abusive situations

where essentially the same claim had been litigated on the merits in a previous federal habeas petition. (Response at 61-62.) Such abusiveness, however, was only one prong of the court's multi-based ruling (845 F.2d at 1240-41); it further concluded that the incompetency claim "is also barred by reason of the procedural default found by the state habeas court." 845 F.2d at 1241. That is precisely what happened here: incompetency at trial was raised by Paragraph 87 of the third Rule 32 Petition. (P.C.R. 3 at 35.) The state argued that all the claims in that petition, with the exceptions of Davis' alleged ineffectiveness, good prison behavior as a new mitigating factor, and incompetency to be executed, were procedurally precluded. (*Id.* at 71-93.) The trial court explicitly agreed with the state's arguments in summarily dismissing that petition. (*Id.* at 138-40.) Therefore, this case *is* governed by *Clanton v. Muncy,* and the claim of incompetency during trial *is* precluded from consideration by this Court.

As additional support for its position that the claim of incompetency at trial is procedurally barred, Respondents cited *Bainter v. Trickey,* 932 F.2d 713 (8th Cir. 1991). Petitioner, as usual, attempts to cast Respondents in a bad light, by noting that *Trickey* "was not a death penalty case, contrary to the apparent insinuation by respondents." (Response at 62.) However, the Summary Judgment Motion at 36 clearly distinguished between *Clanton,* to which was affixed the explanatory parenthetical "(capital case)", and *Trickey,* which was given none such. Moreover, Petitioner is forced to concede the point for which *Trickey* was cited; "it is true that *Trickey* held that the defendant's claim of incompetence was procedurally barred." (Response at 62.) Petitioner nonetheless seeks to

distinguish *Trickey* away on the basis that an evidentiary hearing was held in that case on an ineffective assistance of counsel claim. (*Id.*) This argument avoids the point, which is that a claim of actual incompetence to be tried (i.e., the question under discussion at this point in the pleadings) was indeed ruled to be procedurally barred. 972 F.2d at 716. Moreover, the evidentiary hearing on ineffectiveness in *Trickey* was held by the *state* court (not the federal court), and no issue of procedural default *as to that claim* existed. Therefore, *Trickey* does support the preclusion of the claim of actual incompetence to be tried, but it does *not* support Petitioner's position that he is entitled to an evidentiary hearing before this Court.

Since the claim is so clearly precluded, Respondents continue to maintain that this Court need not (indeed, should not) examine it any further.

> We need not reach the merits to assure Campbell, and ourselves, that his claims have been fully considered. Indeed, upon determining that claims raised in a habeas petition are successive or abusive, we may not do so; respect for the finality of convictions, and the significant costs of federal habeas review, forbid it.
>
> > [A] court may not reach the merits of: (a) *Successive claims* which raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an *abuse of the writ;* or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims.

> *Sawyer v. Whitley*, ___ U.S. ___, ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992) (citations omitted).

Campbell v. Blodgett, 982 F.2d 1321, 1324-25 (9th Cir. 1992) (emphasis in original). However, lest the Court be concerned about the fairness of its proceedings, the merits will be briefly noted.

The Summary Judgment Motion at 36-40 pointed out that there is a very high standard of proof which a habeas petitioner who claims actual incompetence at trial must satisfy in order for that claim to be considered by the federal courts. As an example, Respondents pointed to *Boag v. Raines*, 769 F.2d 1341 (9th Cir. 1985), *cert. denied*, 474 U.S. 1085 (1986); there the Court of Appeals found *insufficient* "(1) five attempted suicides between 1954 and 1965; (2) repeated head injuries; (3) a story of bizarre behavior; and (4) alcoholism. Boag also relies on the report of a prison psychiatrist, made four months before trial, which stated that he had a 'sociopathic personality disturbance, anti-social reaction,' and the statement of a California judge, made six months before trial, that Boag needed 'intensive psychiatric treatment'." 769 F.2d at 1343. Petitioner attempts to distinguish *Boag* away on the premise that there "the defendant's competency . . . was substantively addressed." (Response at 59.) If Petitioner intends to convey that Boag received a federal evidentiary hearing on his claim he is clearly wrong. The Ninth Circuit noted that a habeas petitioner "is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt about his competency . . . " 769 F.2d at 1343. It then reviewed the evidence noted above which

Boag offered (which had not been presented to the state courts), after which it stated, "We conclude that the district court properly found that the new evidence presented by Boag did not raise a real and substantial doubt as to his competency." 769 F.2d at 1344. Thus, there is a high threshold level of proof to be crossed before an evidentiary hearing will be granted, and Boag failed to satisfy that initial burden. Hence, *Boag* is not distinguishable, and clearly militates against granting Petitioner an evidentiary hearing or any other relief.

Petitioner continues to bewail the fact that Respondents have insisted that he follow appropriate procedures to present his claims, even resorting to statements unsupported by the record, such as the supposed notoriety of prison doctors for not prescribing medicine for prisoners, and the asserted "fact" that Respondents "tried everything in the book to prevent petitioner from being examined by an independent mental health expert." (Response at 60-61.) Respondents have never opposed examination of Petitioner by an independent expert – something he has been free to obtain at any time; opposition has only been to attempts to present claims in the wrong forum and to spending taxpayer money for examinations unless they were clearly authorized and likely to be relevant. For such good faith litigation positions no apology is necessary and none is tendered; Petitioner has no special dispensation to ignore the rules just because this is a capital case. *Murray v. Giarratano*, 109 S. Ct. at 2770-71.

* * *

101. Competency To Be Executed.

Respondents have suggested that this issue is not ripe for decision, because no execution can take place without the issuance of a warrant of execution, no such warrant concerning Petitioner presently exists, and the Arizona Supreme Court apparently is not issuing such warrants concerning defendants who are protected (as is Petitioner) by a federal stay of execution. Moreover, mental competency, of course, can change over the course of time. Thus, the claim presents nothing more than a possible future injury, which is insufficient to satisfy the Art. III "case or controversy" requirement, and there currently is no issue over which this Court properly has jurisdiction. (Summary Judgment Motion at 43-45.) Petitioner answers that nothing in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), supports this position. (Response at 65.) On the other hand, neither does anything in *Ford* militate against it. The defendant in *Ford* was subject to a live, unstayed warrant of execution at the time he invoked the jurisdiction of the federal courts (477 U.S. at 404), and the issues raised by the case were the existence of authority to execute the insane and the kind of state factfinding procedures necessary to resolve competency questions. Thus, there was no basis for a ripeness question and *Ford* did not address it because it simply never came up.

Petitioner makes no attempt to answer the authority and reasoning presented by the Motion For Summary Judgment, and seeks to dismiss its argumentation with a conclusory remark that it is "unworkable." (Response at 65.) It is Petitioner's approach, however, which is unworkable; rather than have a single adjudication of

competency, at a time when all his other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time, he advocates "plac[ing] an incredible burden on the system" by having one adjudication now, plus at least one more, after all the years it typically takes to resolve the other claims have transpired. Even in Petitioner's competency to stand trial analogy, speedy trial guarantees will insure that a competency determination is made within a reasonably short time before the relevant proceeding (the trial) occurs; no such guarantees exist in this case. To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

The Court should therefore conclude that this claim is not now ripe for determination. Should the Court nonetheless deem it proper to rule on the issue it should hold the claim meritless. The only support offered is the Geffen report, which has already been shown to be so riddled with flaws as to be incapable of supporting a finding of incompetence, especially in light of the opposite conclusion reached by the 1991 evaluation (Exhibit H) and the information about Petitioner's manipulative invocation of purely subjective mental complaints disclosed by the prison records. Therefore, if the merits of the question are considered, the only proper resolution would be denial.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL Petitioner, vs. SAMUEL A. LEWIS et al., Respondents.	NO. CIV 86-296 TUC RMB **ORDER** (Filed Feb. 28, 1997)

Pursuant to instructions of the Court of Appeals for the Ninth Circuit set forth in *Martinez v. Lewis*, 80 F.2d 1301 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996),

IT IS ORDERED that Petitioner Ramon Martinez-Villareal's Claim 4.16 regarding competency to be executed is **DENIED WITHOUT PREJUDICE**;

IT IS FURTHER ORDERED that all remaining claims of the Petition are **DENIED WITH PREJUDICE**.

DATED: February 27, 1997 /s/ Richard M. Bilby
Richard M. Bilby
United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Plaintiffs vs. SAMUEL A. LEWIS, ET AL., Defendants,	**JUDGMENT IN A CIVIL CASE** Case NO. CV-86-296-TUC-RMB (Filed February 28, 1997)

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner Ramon Martinez-Villareal's Claim 4.16 regarding competency to be executed is **DENIED WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that all remaining claims of the Petition are **DENIED WITH PREJUDICE.**

February 28, 1997
Date

RICHARD H. WEARE
CLERK

/s/ Maureen Gorski
(By) Deputy Clerk,
Maureen Gorski

cc: OB, RMB, BRUNER, FERG, DPLC, DESSAINT, ACRP

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602-624-8000
Attorneys for Petitioner
By: Sean Bruner, Bar #007296

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, TERRY STEWART, et al., Respondents.	NO. CIV 86-296-TUC-RMB MOTION TO RECONSIDER ORDER AND JUDGMENT (Filed March 12, 1997)

Pursuant to this Court's order and judgment entered February 28, 1997, petitioner's claim 4.16 regarding competency to be executed was denied without prejudice. Petitioner hereby moves this court to reconsider that aspect of its order, pursuant to Rule 59, *Fed.R.Civ.P.*

Petitioner directs the Court's attention to certain sections of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), amending 28 U.S.C. § 2254.

In that regard, § 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Further on in that section, subparagraph (b)(3)(A) states: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate

court of appeals for an order authorizing the district court to consider the application."

The Court of Appeals, however, is limited in the type of successor petitions that may be granted. The applicable portion of § 2255 states: "A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convicning [sic] evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable."

In other words, petitioner's claim to incompetence to be executed would be barred notwithstanding this Court's dismissal "without prejudice." This would contravene the clear intention of the parties, violate due process under the Fifth and Fourteenth Amendments, and constiute [sic] an unconstitutional suspension of the writ of habeas corpus in violation of Art. I, Sec. 9 of the Constitution.

Petitioner did file his claim in his last petition, prior to the passage of the AEDPA. It was the State that suggested that the claim was not ripe since the Arizona Supreme Court had not yet issued a warrant of execution, and this Court agreed. (Order and Memorandum Decision at 18-19). The Ninth Circuit concurred that the claim was premature. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1307 (9th Cir. 1996).

In light of the understanding of all parties that petitioner's claim to incompetence to be executed would await a future hearing, it would be a cruel injustice to now find that petitioner's challenge was barred as a successive claim. In *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) the Seventh Circuit found that the AEDPA applied to cases which were pending at the time it took effect. The Ninth Circuit reached the opposite conclusion in *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996). The Supreme Court granted certiorari in *Lindh v. Murphy* on January 10, 1997 to resolve this issue. In the interest of fairness and in an abundance of caution, petitioner asks that this Court reconsider its order dismissing his claim to incompetence to be executed and amend its order of February 28, 1997 holding this issue in abeyance pending the outcome of the current proceedings in the Superior Court in Pinal County to determine compentence [sic] to be executed under A.R.S. § 13-4022.

Respectfully submitted March 11, 1997.

/s/ Sean Bruner
Sean Bruner
Attorney for Petitioner

Copy mailed/delivered this date to:

Bruce M. Ferg
Assistant Attorney General
402 West Congress
3rd Floor
Tucson, Arizona 85701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL Petitioner, vs. SAMUEL A. LEWIS et al., Respondents.	NO. CIV 86-296 TUC RMB **ORDER** (Filed March 24, 1997)

Petitioner files under Fed. R. Civ. P. 59, a "Motion to Reconsider Order and Judgment" wherein he seeks this Court to hold in abeyance his claim that he is incompetent to be executed. Petitioner cites no authority for such action except to warn the Court that the premature claim could be precluded as a successive claim by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner requests that in the interest of fairness and in an abundance of caution, that this Court amend its order to hold this single claim in abeyance pending the outcome of the proceedings in Superior Court in Pinal County to determine whether Petitioner is competent to be executed under A.R.S. § 13-4022.

After considering Petitioner's arguments, the Court finds no reason to grant the requested relief. That particular claim could not even be construed as an unexhausted claim since it was not ripe when it was presented. For this

reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the "incompetency to be executed" claim as a successive petition. Accordingly,

IT IS ORDERED that Petitioner's "Motion to Reconsider Order and Judgment" in **DENIED.**

DATED this 24 day of March, 1997,

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States
District Judge

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, vs. RAMON MARTINEZ-VILLAREAL, Appellant.	Supreme Court No. CR-83-0207-AP [5963] Court of Appeals No. 2 CA-CR 3160 Santa Cruz County Nos. 4541-A, 4653-A and 4628-A **WARRANT OF EXECUTION** (Filed April 15, 1997)

The appeal in the above-entitled cause was heard and fully considered by this Court on the 12th day of April, 1984 and having finally decided the cause, this Court on the 10th day of July, 1985, did affirm the judgment of the Superior Court of Santa Cruz County, State of Arizona, and did file its opinion, which opinion is now of record in this Court, is still in effect, and, as shown by this Court's record, has not been stayed or affected by any subsequent decision of this or any other Court.

WHEREAS, a Warrant of Execution issued by this Court on March 12, 1997 was quashed by order in Martinez-Villareal v. Johnson, No. CV-97-0151-SA, dated April 8, 1997, which order further directed that the execution be set for May 21, 1997,

NOW THEREFORE, IT IS ORDERED, that Wednesday, the 21st day of May, 1997, be and the same is hereby fixed as the time when the judgment and sentence of death pronounced upon the appellant, RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz

County, State of Arizona, shall be executed by administering to RAMON MARTINEZ-VILLAREAL an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, except that RAMON MARTINEZ-VILLAREAL shall have the choice of either lethal injection or lethal gas.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith prepare and certify under his hand and the seal of this Court a full, true and correct copy of this Warrant, and cause the same to be delivered to the Director of the Department of Corrections and the Superintendent of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of the appellant, RAMON MARTINEZ-VILLAREAL, as commanded by the judgment and sentence of death pronounced against RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz County, State of Arizona, on the 20th day of May, 1983.

Upon the execution of RAMON MARTINEZ-VILLAREAL, the Superintendent shall, pursuant to Rule 31.17(c), Rules of Criminal Procedure, forthwith make a return upon this Warrant to the Supreme Court of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the Arizona Courts Building, this 15th day of April, 1997.

/s/ Thomas A. Zlaket
THOMAS A. ZLAKET, Chief Justice

/s/ Charles E. Jones
CHARLES E. JONES, Vice Chief Justice

/s/ Stanley G. Feldman
STANLEY G. FELDMAN, Justice

/s/ James Moeller
JAMES MOELLER, Justice

/s/ Frederick J. Martone
FREDERICK J. MARTONE, Justice

STATE OF ARIZONA
SUPREME COURT

I, NOEL K. DESSAINT, Clerk of the Supreme Court of the State of Arizona, hereby certify the above and foregoing (2 pages) to be a full and true copy of the WARRANT OF EXECUTION of RAMON MARTINEZ-VILLAREAL, filed by said Supreme Court in the said above-entitled action on this 15th day of April, 1997.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona, this 15th day of April, 1997.

/s/ Noel K. Dessaint,
NOEL K. DESSAINT, CLERK

Fredric F. Kay
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY STEWART et al., Respondents.	**CAPITAL CASE** **EXECUTION SCHEDULED FOR 5-21-97** No. CIV-86-296 TUC RMB MOTION FOR EXPERT SERVICES AND/OR ACCESS TO CLIENT AND APPOINTMENT OF COUNSEL (Filed May 13, 1997)

Petitioner Ramon Martinez-Villareal, through counsel specially appearing herein, and pursuant to 21 U.S.C. § 848(q)(4) and (9), moves this Court for appointment of necessary experts, assistance and/or access to his client

to allow this Court to properly determine his competency to be executed. The following facts support this motion:

1. Petitioner Ramon Martinez-Villareal is mentally retarded and he is unaware of his pending execution and the reasons for it. Mr Martinez-Villareal, through counsel, alleged Mr. Martinez-Villareal "did not and does not have the mental capacity to appreciate the nature of his sentence." Amended Petition for Writ of Habeas Corpus ("Habeas Petition"), filed Mar. 26, 1993 at ¶ 4.16[1] Since Mr. Martinez-Villareal did not and does not have the mental capacity to appreciate the nature of his sentence, under *Ford v. Wainwright*, 477 U.S. 399 (1986), his rights under the Eighth and Fourteenth Amendment would be violated if he is executed. *Id.* at ¶ 106.

2. The Court issued a writ of habeas corpus. Entry, Oct. 21, 1994 [Doc. No. 137]. The Court found that Mr. Martinez-Villareal did not receive the effective assistance of counsel and vacated the sentence of death. *Id.*, Order and Memorandum Opinion, Oct. 21, 1994 [Doc. No. 136], at 30.[2] As to the challenge to Mr. Martinez-Villareal's

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[1] Facts supporting the claim were outlined in ¶¶ 25 through 90 of the habeas petition.

[2] The Court's finding was based, in part, on the testimony of Dr. Garcia-Bunuel. Order and Memorandum Opinion, Oct. 21, 1994 at 29. Dr. Garcia-Bunuel opined that Mr. Martinez-Villareal suffers from paranoid schizophrenia and he had this mental disease since he was an adolescent. *Id.* at 26. The Court also observed:

> Physically, Martinez-Villareal is a small man, no more than five feet tall. During the proceedings his face was devoid of expression; his hair was greasy and stood upward in peaks. His eyes were downcast and

competency to be executed, the Court ruled "[a]t present, there is no execution warrant outstanding as to Martinez-Villareal since this Court issued its stay. Thus, Martinez-Villareal is not facing execution nor with appellate review will he face likely execution in the near future. This claim is premature and denied without prejudice." Order and Memorandum Opinion, Oct. 21, 1994 at 19.

3. On appeal, the Ninth Circuit found that the writ was improperly granted. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996). The court based its decision on a procedural bar to Mr. Martinez-Villareal's claim of ineffective assistance of counsel. *Id.* However, the court of appeals explicitly stated, "[t]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question." *Id.* at 1309, n.1. On remand, this Court entered an order denying, without prejudice, Mr. Martinez-Villareal's competency challenge. Order and Entry, Feb. 28, 1997.[3] [Doc. Nos. 152 and 153.]

> once he was led into the courtroom, his only movement was to remove the interpreter's headphones. Other than the effort it took to perform this task, [Martinez-Villareal] was essentially catatonic for the duration of the two day hearing.

Id. at 14-15.

[3] The Court, through a subsequent order, stated that the reason the competency to be executed claim was dismissed was because "it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the 'incompetency to be executed' claim as a successive petition." Order, Mar. 24, 1997 [Doc. No. 155], at 1. Petitioner appealed that order simply to ensure that jurisdiction was not lost if Respondents should take a contrary position when the petition is supplemented with this claim.

4. On April 15, 1997, the Arizona Supreme Court issued an execution warrant setting Mr. Martinez-Villareal's execution for 12:05 am on Wednesday, May 21, 1997. *State v. Martinez-Villareal*, No. CR-83-0207 AP (Ariz. Apr. 15, 1997). [Exhibit A.] A hearing was held in the Pinal County Superior Court on April 6, May 6, 7 and 8, 1997,[4] to determine whether Mr. Martinez-Villareal was competent to be executed. At the state court hearing, substantial evidence and testimony established that Mr. Martinez-Villareal continues to experience symptoms of a major psychotic disorder, which was traced back to his childhood, and that his condition is compounded by mental retardation and brain damage. The state claimed that Mr. Martinez-Villareal is malingering all of these conditions.

5. Prior to and during the hearing, counsel for Mr. Martinez-Villareal asked the superior court for leave to conduct a MRI scan and neurometric EEG of Mr. Martinez-Villareal and further asked for an expert specializing in the field of mental retardation to exam Mr. Martinez-Villareal. Counsel explained that the accusation that Mr. Martinez-Villareal was malingering his condition, and that he made statements reflecting an awareness of his crime and punishment, increased the need for a reliable determination of the issues of brain damage and

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[4] The hearings on April 6th and May 8th were half day hearings.

mental retardation. Counsel also requested an opportunity to conduct further specific testing into the issue of mental retardation – including objective assessment of Mr. Martinez-Villareal's adaptive behavior skills which would provide substantial proof of his reasoning capacity, or lack thereof.[5] The record reveals that mental retardation is a significant contributing factor to Mr. Martinez-Villareal's mental capacity and his behavior in the Arizona Department of Corrections. Finally, counsel requested additional time and resources to conduct a thorough background investigation into Mr. Martinez-Villareal's family and social history. It is important to the issue of malingering – which the state injected into the case – to verify as much of Mr. Martinez-Villareal's medical and social history as possible, including past head trauma and a possible psychiatric referral by defendant's uncle.[6] All of the requests were denied by the superior court and the hearing commenced without petitioner having an opportunity to present such evidence.

6. A day after the conclusion of the evidence the superior court determined, *inter alia*, that:

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[5] Counsel requested the court to appoint Dr. Denis Keyes, an expert in the field of mental retardation who was willing to conduct an expedited examination which would not have delayed the hearing process.

[6] Mr. Martinez-Villareal, because of his mental impairment and illiteracy in Spanish and English, has never been able to provide reliable background, health and social history. He does not even know his age or date of birth. Counsel requested and were denied time and resources to locate the family members who could verify the fact that Mr. Martinez-Villareal has been mentally ill since childhood.

> Credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer from a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestations of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by the law. . . .

State v. Martinez-Villareal, No CR 97022291 (may 9, 1997) [Exhibit B.] The Court concluded Mr. Martinez-Villareal was aware that he is to be punished for the crime of murder and that the punishment for that crime is death, and that he is therefore competent to be executed. *Id.*

7. Mr. Martinez-Villareal is now before this Court requesting expert services and the appointment of counsel so that his competency to be executed claim can be fully developed and presented in this Court. Given the ambiguity and inadequacy of the trial court's findings, assuming they can even be characterized as such, this Court will need to conduct a de novo review of this claim. As a result, to make a full and fair decision on this claim, it will need all the information it can obtain on this serious issue.

8. This Court has jurisdiction to hear this motion. Congress, through 28 U.S.C. § 848(q)(4)(B) "established a

right to preapplication legal assistance for defendants in federal habeas corpus proceedings." *McFarland v. Scott*, 512 U.S. 849, ___, 114 S.Ct. 2568, 2572 (1994). This assistance extends to the services of investigators and other experts [who] may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id.* 114 S.Ct. at 2572 *citing* 21 U.S.C. § 848(q)(9). This Court has the authority to grant a fee request to assist Mr. Martinez-Villareal "in preparing for his federal habeas efforts." *Calderon v. United States District Court for the Eastern District of California*, ___ F.3d. ___, 1997 WL 183877, at *1, *6 (9th Cir. Apr. 16, 1997). A " 'post conviction proceeding' within the meaning of section 848(q)(4)(B) begins upon the filing of the defendant's motion requesting the assistance of counsel for his federal habeas corpus proceeding." *Id. citing McFarland v. Scott*, 114 S.Ct. at 2572-73.[7]

9. Petitioner requires expert assistance and/or access to his client before he files his supplemented petition for writ of habeas corpus.[8] As discussed above, this

[7] Mr. Martinez-Villareal's request for appointment of counsel is made at ¶ 13, *infra*.

[8] If this Court appoints the Federal Public Defendant as requested below, it need only grant the request for access to Petitioner to conduct necessary testing. Under the policies of the Arizona Department of Corrections ("DOC"), a contact visit between counsel, a mental health expert and Petitioner will not be allowed absent a court order. The state court issued such an order below, and contact visits were allowed. Petitioner requests that this Court also issue such an order so that the needed evaluations can go forward. In addition, this Court previously allowed experts to have access to Mr. Martinez-Villareal for purposes of testing. *See* Doc. Nos. 90, 108, 110, and 112.

is because, despite requests both before and during the recent state court hearing on whether Petitioner was competent to be executed, the state court denied Petitioner the services of necessary experts, including an expert in field of mental retardation. In the habeas proceedings in this Court on Claim 4.16, Mr. Martinez-Villareal will present facts concerning his mental retardation and explain that mental retardation exacerbates and relates to his present incompetency.

10. Mr. Martinez-Villareal is requesting from this Court that which was denied to him by the state court, and what was needed to determine the question of his competency. He is requesting funding for an MRI scan, which creates a visual image of the brain structure, and neurometric EEG, which measures brain functioning, as well as funding to retain Dr. Dennis Keyes.[9]

10.1 Jonathan H. Pincus, M.D., conducted a neurological examination of Mr. Martinez-Villareal and reported not only is Mr. Martinez-Villareal psychotic, but "[t]his subject is mentally retarded, his IQ 61, and his frontal lobe functions are impaired on neurological examination." Correspondence from Jonathan H. Pincus to Sean D. O'Brien, Apr. 1, 1997 ("Pincus correspondence") at 6. [Exhibit C.] Dr. Pincus concluded "[a]n MRI of [Mr. Martinez-Villareal's] brain could help to explain why his brain is not working properly." *Id.*

10.2 Joseph Geffen, PhD., also tested Mr. Martinez-Villareal and concluded he is "mentally retarded, brain damaged and psychotic." Affidavit of Dr. Geffen,

[9] *See* footnote 8, *supra*.

Apr. 8, 1997 ("Geffen Affidavit") at ¶ 2. [Exhibit D.] According to Dr. Geffen, "[a]n MRI is necessary to help detect any structural abnormality of the brain that may account for the organic brain dysfunction indicated by neurological and neuropsychological testing and patient history." *Id.* at ¶ 4. The neurometric EEG is "especially critical in examining Mr. Martinez-Villareal's frontal cerebral cortex, which is the seat of higher brain functions, including the ability to understand the abstract concepts necessary to understand the cause-effect relationship between the crime and the punishment." *Id.* at ¶ 6. Dr. Geffen concluded, that in addition to the MRI and neurometric EEG, "it would be important to obtain an examination of an expert in the area of mental retardation, preferably one who is bi-lingual. . . . [I]t appears that behavior consistent with mental retardation is being misinterpreted [by state officials] as indicia of competence. . . . Although Mr. Martinez-Villareal is brain damaged and psychotic, his impairment is significantly exacerbated by his extremely limited intellectual functioning." *Id.* at ¶ 7.

10.3 Assessment of Mr. Martinez-Villareal by a psychologist specializing in the field of mental retardation is critical to an accurate assessment to his present level of competence. Counsel has consulted Dr. Denis Keyes, PhD., Assistant Professor of Special Education at the College of Charleston, South Carolina, regarding the issue of mental retardation in this case. Dr. Keyes' initial impression of this case is that Mr. Martinez-Villareal's mental retardation is under emphasized. Although IQ testing places him well within the range of mental retardation, an adaptive skills diagnosis is necessary to detect

the severity of his mental retardation. A subject's adaptive skills are more important to a diagnosis of mental retardation than IQ testing alone. Dr. Keyes would administer the Vineland Scale of adaptive behavior, which involves interviewing a minimum of four to five individuals who are most familiar with Mr. Martinez-Villareal's development and behavior, including his family, friends, lawyers and corrections staff. From reviewing portions of the record in this case, Dr. Keyes has expressed a concern that Mr. Martinez-Villareal, as is typical of most persons with mental retardation, is extremely suggestible and subject to manipulation during questioning. He has a specific concern regarding this case, which could be addressed by further investigation, that statements and conduct of Mr. Martinez-Villareal has been misinterpreted as indicia of competence.

11. The refusal by the state court to provide funding for testing and experts, effectively denied Mr. Martinez-Villareal of the adequate fact-finding procedure that he was entitled to in the state court. Two key elements were missing from the hearing in state court: test results, which in turn would offer proof of brain damage; and an evaluation and testimony by a psychologist to explain mental retardation and its affect on a person who is brain damaged. Without this evidence, much less the ability to obtain this evidence and present it to the state court, there is no presumption of correctness afforded to the state court decision. Testing and expert assistance will be necessary for Mr. Martinez-Villareal to present his allegations in support of Claim 4.16 to this court.

12. This Court also has the authority to appoint counsel for Mr. Martinez-Villareal. Section 848(q)(4)(B) of

Title 21 of the United States Code "established a right to preapplication legal assistance for defendants in federal habeas corpus proceedings." *McFarland v. Scott*, 114 S.Ct. at 2572. The language and purposes of § 848(q)(4)(B) and its related provisions establish that the right to appointed counsel includes a right to legal assistance in the preparation of the habeas corpus application." *Id.* Mr. Martinez-Villareal, who is indigent, requests counsel so that he may prepare to seek a stay of execution and reinstate his competency to be executed claim.

13. Although Mr. Martinez-Villareal has been represented by Sean Bruner in the state court proceedings below, and was represented by Mr. Bruner in proceedings in this Court, Mr. Bruner can no longer continue in the representation because he has become an important witness as to Mr. Martinez-Villareal's competency to be executed. Due to past and continuing observations of Mr. Martinez-Villareal made by Mr. Bruner, it may be necessary for Mr. Bruner to be called as a witness at a competency hearing in this Court. Accordingly, Mr. Bruner is not seeking appointment for this proceeding. For that reason, Petitioner requests that the Federal Public Defender for the District of Arizona and Sean D. O'Brien be appointed to represent him in his habeas corpus proceedings. Sean D. O'Brien is the Director of the Public Interest Litigation Clinic in Kansas City, Missouri. He was appointed to represent Mr. Martinez-Villareal in the state court competency proceedings. Mr. O'Brien's continued participation, given the short period of time in which the claim may need to be litigated, is necessary as he is most familiar with the facts of the case, the witnesses and the

proceedings in the state court. Mr. O'Brien possesses the necessary qualifications to be appointed in this matter.[10]

14. Finally, Petitioner requests access to his client to allow the necessary evaluations and testing to take place. DOC does not permit contact visits absent a court order. This Court and the state court previously issued orders that Petitioner be given contact visits with his attorneys and mental health experts. DOC complied with that order. Petitioner asks this Court to issue a similar order so that necessary investigation can be completed.

For all these reasons, Mr. Martinez-Villareal requests the immediate appointment of counsel and necessary experts or access to his client so that counsel may prepare the competency claim, and related pleadings, for consideration by this Court. Given the impending execution date, Petitioner asks that this motion be given expedited consideration.

Respectfully submitted this 13th day of May, 1997.

Fredric F. Kay
Federal Public Defender
Denise I. Young
Dale A. Baich

Sean D. O'Brien

By /s/ Denise Young
COUNSEL FOR PETITIONER

---

[10] A further description of Mr. O'Brien's qualifications are listed in his resume. [Exhibit E.]

Copy of the foregoing
mailed this 13th day of
May, 1997 to:

Bruce M. Ferg
Assistant Attorney General
Office of the Attorney General
400 West Congress, Bldg. S, Ste. 315
Tucson, AZ 85701-1367

/s/ Denise Young

EXHIBIT A

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, **Appellee,** **vs.** **RAMON MARTINEZ-VILLAREAL,** **Appellant.**	**Supreme Court No. CR-83-0207-AP [5963]** **Court of Appeals No. 2 CA-CR 3160** **Santa Cruz County Nos. 4541-A, 4653-A and 4628-A**

WARRANT OF EXECUTION

(Filed April 15, 1997)

The appeal in the above-entitled cause was heard and fully considered by this Court on the 12th day of April, 1984 and having finally decided the cause, this Court on

the 10th day of July, 1985, did affirm the judgment of the Superior Court of Santa Cruz County, State of Arizona, and did file its opinion, which opinion is now of record in this Court, is still in effect, and, as shown by this Court's record, has not been stayed or affected by any subsequent decision of this or any other Court.

WHEREAS, a Warrant of Execution issued by this Court on March 12, 1997 was quashed by order in Martinez-Villareal v. Johnson, No. CV-97-0151-SA, dated April 8, 1997, which order further directed that the execution be set for May 21, 1997,

NOW THEREFORE, IT IS ORDERED, that Wednesday, the 21st day of May, 1997, be and the same is hereby fixed as the time when the judgment and sentence of death pronounced upon the appellant, RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz County, State of Arizona, shall be executed by administering to RAMON MARTINEZ-VILLAREAL an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, except that RAMON MARTINEZ-VILLAREAL shall have the choice of either lethal injection or lethal gas.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith prepare and certify under his hand and the seal of this Court a full, true and correct copy of this Warrant, and cause the same to be delivered to the Director of the Department of Corrections and the Superintendent of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of the appellant, RAMON MARTINEZ-VILLAREAL, as commanded by the judgment and sentence of death

pronounced against RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz County, State of Arizona, on the 20th day of May, 1983.

Upon the execution of RAMON MARTINEZ-VILLAREAL, the Superintendent shall, pursuant to Rule 31.17(c), Rules of Criminal Procedure, forthwith make a return upon this Warrant to the Supreme Court of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the Arizona Courts Building, this 15th day of April, 1997.

/s/ Thomas A. Zlaket
THOMAS A. ZLAKET, Chief Justice

/s/ Charles E. Jones
CHARLES E. JONES, Vice Chief Justice

/s/ Stanley G. Feldman
STANLEY G. FELDMAN, Justice

/s/ James Moeller
JAMES MOELLER, Justice

/s/ Frederick J. Martone
FREDERICK J. MARTONE, Justice

STATE OF ARIZONA
SUPREME COURT

I, NOEL K. DESSAINT, Clerk of the Supreme Court of the State of Arizona, hereby certify the above and foregoing (2 pages) to be a full and true copy of the WARRANT OF EXECUTION of RAMON MARTINEZ-VILLAREAL, filed by said Supreme Court in the said above-entitled action on this 15th day of April, 1997.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona, this 15th day of April, 1997.

/s/ Noel K. Dessaint
NOEL K. DESSAINT, CLERK

EXHIBIT B

OFFICE DISTRIBUTION
[X] DIVISION
[X] COUNTY ATTORNEY

IN THE SUPERIOR COURT
OF
PINAL COUNTY, STATE OF ARIZONA

Date 05/09/1997

JUDGE HONORABLE BOYD T. JOHNSON
DIVISION 4 ALMA JENNINGS HAUGHT, CLERK
COURT REPORTER none By Melissa A. Rabago, Deputy
ADDRESS & PHONE

THE STATE OF ARIZONA,
Plaintiff,
vs
RAMON MARTINEZ-VILLAREAL,
Defendant(s).

Case No. CR97022291

MINUTE ENTRY
ACTION:

RULING

(Filed May 9, 1997)

PRESENT:

The Court having considered the pleadings of the parties; having reviewed the reports of the mental health experts herein; having reviewed all exhibits admitted into evidence; having considered the testimony of witnesses herein and the arguments of counsel; having considered all relevant legal authority; and upon good cause shown:

FINDS, as follows:

1. That the Defendant, Ramon Martinez-Villarreal, is an inmate in the custody of the Arizona Department of Corrections who has been sentenced to death; that this action was brought by and on behalf of the Defendant, upon a petition filed pursuant to A.R.S. §13-4022, as amended, alleging that the Defendant is not competent to be executed;

2. That A.R.S. §13-4022(E), as amended, provides a presumption that a person who has been sentenced to death is competent to be executed; that it further places the burden upon the defendant to prove by clear and convincing evidence that he is not competent to be executed; that the mental competency at issue in this proceeding is as defined by A.R.S. §13-4021, as amended;

3. That credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer from a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestation of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and medical evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by law; credible testimony and medical evidence was likewise presented at the hearing herein that the Defendant may not suffer from any of those illnesses or conditions or may suffer in a lesser degree from one or more of those illnesses or conditions and may, in fact, be malingering, as that term was medically defined during the testimony of witnesses;

4. That the determination whether the burden of proof has been met may only be made after a careful review and analysis of all the evidence presented the Court; that, upon review of all the evidence presented the Court, this Court FINDS that the Defendant has failed to prove by clear and convincing

evidence, or by the lesser standard of preponderance of the evidence, that he is not competent to be executed;

5. That the Court FURTHER FINDS that Defendant is aware that he is to be punished for the crime of murder and that he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villarreal, is therefore competent to be executed under the laws of the State of Arizona.

IT IS THEREFORE ORDERED that the petition to find the Defendant incompetent to be executed is denied.

DONE this 9th day of May, 1997.

/s/ Boyd T. Johnson
HONORABLE BOYD T. JOHNSON

EXHIBIT C

GEORGETOWN UNIVERSITY MEDICAL CENTER
Department of Neurology
Jonathan H. Pincus, MD
Professor and Chairman Emeritus

April 1, 1997

Mr. Sean O'Brien
Public Interest Litigation
5319 Rockville Road
Kansas City, Missouri 64110

Re: Ramon Martinez Villa-Real

Dear Mr. O'Brien,

I examined Mr. Ramon Martinez Villa-Real on Monday, March 31, 1997, in the federal penitentiary in Florence, Arizona, and I have reviewed the records that you were kind enough to send. These included the segment from the *Pacific Reporter*, second series, July 10, 1985, pages 670-681, the affidavit of Dr. Garcia-Bunuel concerning his examination on March 5, 1994, and the affidavit of Dr. Joseph Geffen of his examination dated September 21, 1993 and June 22, 1994. I also reviewed the testimony of Dr. Geffen, direct by Mr. Bruner pages 8-73 and the direct testimony of Dr. Garcia-Bunuel pages 143-200. In addition, I saw the physical exams and general medical records, mental health records, medication records, and X-rays and lab tests from the Arizona State Department of Corrections.

My examination and history was performed on March 31, 1997, over a four hour period from 10:30 in the morning to 2:30 in the afternoon. I saw him in response to

your urgent request concerning his competency to be executed. An execution date had already been set some two weeks hence. The history was obtained with Mr. Bruner present in order to allay suspicious feelings concerning my role in his defense and with an interpreter, Ysabelle.

He entered looking somewhat disheveled with about three days growth of beard, and his hair was short but had not been brushed. His posture was flexed in general, and he appeared dejected. He looked down at his hands and played with his fingers for the entire four hours that I was there. I do not think that we established eye contact more than four times and then only briefly. I began by asking him if he knew why I was there. I explained that I was a neurologist, a doctor who takes care of the brain and the nervous system and its diseases. He said that he did not know why I was there. I asked him if he knew how anything I found might be helpful to him, and he claimed not to. I asked him if he knew that he was to be executed, and he claimed not to know what that meant. I asked him if he would come back after the execution, and he said that he does not know what happens afterward. I asked if he would eat and watch TV, and he answered by saying, "I do not get hungry much, and I only watch TV in the afternoons." This lack of responsiveness to the question I had asked was typical. I said to him, "Once you are killed, you would not eat or watch TV." He responded, "Munoz said he is writing a ballad about me."

I had been told that he was married, so I asked him about this. He nodded, "Yes." I said, "Does you wife live in a house?" He looked uncomfortable and said that they were not actually married. I said, "Do you live in a

house?" He indicated that he lived in a house and then corrected that to say that she lived in a house. I said, "Does she live in the house with you?" He said that no, she lived in a house that was near where his house was. I said, "Well, why don't you live together?" He said, "Well, she lives with her husband in a house with her children." It turns out that he visited her occasionally in the evening. In other words, he had a relationship with a woman who was a wife, not his wife. The lack of understanding which was mutual in this case was not just a matter of language. We had a perfectly competent interpreter. It is a matter of retardation and a kind of literalness in the interpretation of words, which is seen in brain-damaged individuals and psychotic individuals.

Because he had been described as disheveled with a beard and matted hair in the past, I asked him about his appearance. He indicated that the guards give him a shave weekly on Sundays and sometimes by force or with threat of force. The reason that he does not like to walk to the bathroom to take a shave is because his legs hurt. I thought that the pains in his legs when he walks may relate to diabetic neuropathy. He is known to have diabetes.

There was some discussion in the records I reviewed of his having enjoyed television and of responding appropriately to television programs by laughing. I asked him about his television viewing, and he told me that he likes to watch the Mexican channels because he enjoys hearing Spanish spoken. He speaks no English. I asked him if he ever watched the soccer matches, and he indicated that sometimes they show soccer matches on the Mexican

channel. I asked if he ever laughs while watching television, and he said that he laughs when soccer players fall down. He denies having a favorite team and denied following the fortunes of any specific team.

He then spontaneously told me about other times he laughs. He talks to himself in his cell, and sometimes he laughs. A guard asked him why he was talking to walls and laughing. He laughed when the guard asked him. Once a guard came into his cell to search him. He laughed, and the guard asked why. Ramon responded, "You are able to speak Spanish, but you only speak English to me." He said to me, "I was not laughing at the guard, but that is what the guard thought."

I asked him how he knew that the guard thought that his laughter was directed at the guard. "Because," he said, "the guard seemed angry," and the guard said to him, 'Que passa?' when he entered his cell. Yet, Ramon was lying on his bed with his face to the wall when he was laughing, so clearly he was not laughing at the guard.

I though [sic] Ramon's interpretation of this incident was a bit paranoid, so I asked him if there were others who were angry at him. This led to a long story about a check, a letter, signing for a check, and receiving a receipt that was not responsive to the issue we were discussing and was a digression, what psychiatrists call loose associations. This is something seen in people who have a thought disorder caused by a neurologic disease of the brain or a psychosis or both.

Then we got back to the subject of anger, and he said that people were angry at him because he had temporarily taken the ear plugs out of his ears that were attached to his radio so that his radio could be heard by others. He said that the guards turned off his light not just the radio, and he continued, "the guard is a jerk. He gave me two sandwiches in the afternoon instead of a regular dinner." Ramon does not know if a doctor ordered this or not because of his diabetes, but "sometimes they don't give me the milk I ask for. They say wait a minute, but they say it wrong. They say, 'Poquito momento.' There is one guard who won't bring me milk. *They* don't bring me milk because they are angry. It makes me feel bad because I haven't done anything bad. The other guys turn on their radios high, and the guards do nothing to them. It makes me feel ashamed."

The picture drawn by Ramon was one of aloneness. The guards are against him, the other inmates are against him, and all without reason.

Ramon had been receiving antipsychotic medication. At one point, he had Navane 5 mg twice a day and was taking Cogentin and/or Artane with it. He had been treated with this was for a number of years, but the antipsychotic medication had been discontinued about a year ago. I asked about the effect on him of stopping that medication. He misunderstood my question or answered another one and started talking about his hearing. It turns out that he has a problem hearing with his left ear. When I asked him about what he does hear that other people can't, he indicated that he hears voices and sometimes sees snakes. I asked about the identity of the voices, and he said that there is a man's voice and a woman's

voice that do not have names. Both tell him to cut himself. The woman's voice is like his dead sister, Maria. She was like a mother to him, and after he was orphaned, she took care of him. He said, "Her children are like my own," and then he cried. He said that she was a half sister. She looked for him when he would go out to work and stay away for several days. She lived on another ranch about one day's walk from where his older brothers and sisters were living in the mountains in a communal agricultural village.

This conversation is not responsive to my question about what happened after he stopped his antipsychotic medication, but I let him continue. He said that his mother and his father treated him better than they treated the other brothers and sisters and protected him because of his illness. They had identified him as being mentally ill early on. He was not able to say how old he was when he began hearing the voices, but he said that when he was 12 or 13 he banged his head against the wall because of voices, and his father used to take him with him on jobs in order to keep an eye on him. His father died when he was 16 or 17 he told us.

Though his father never beat him, he did beat the other children and told the other children not to hit him or tease him because he did not know what he was doing. He was not able to specify what such acts might be, but he said that when his father beat the other children, he used electric extension wire and beat them on their backs as well as their legs. Though he denied any such beatings that were directed at him, it sounds to me as if that may very well have been a very violent home.

We discussed the voices. They are the same as the ones he has always heard, and they tell him to hurt himself. The voices were speaking to him at the time that we conversed and were "telling him to go back to his cell." He said that they keep him up at night. He said that the medicine reduced the voices but did not eliminate them. He wants to take the medication again. The voice is not his sister, but it is her voice. It is mainly the man who tells him to hurt himself. It is not comforting to hear his sister's voice, but it makes it worse.

He expressed intensely ambiguous feelings about two men, Munoz and Ortiz, both of whom have provided him with considerable comfort and speak to him in Spanish and have conversed with him for long periods of time and that others have been extremely cruel to him and taunted him and want him to die. During his account of his relationship with Ortiz, he had a long digression into how he made 31 cups of coffee and had to serve them in the prison.

On examination, he was 4'9". His eardrums were clear. There is a marked hearing deficit in the left ear, and tuning fork applied to his forehead is heard best on the right. This indicates nerve deafness on the left. His head circumference was 55 cm, which is within normal limits. He made no or very little eye contact with me. Eye movements were not smooth but showed saccades in tracking, and there was impersistence of gaze.

Motor examination revealed normal strength and tone throughout. There were no choreiform movements or tremor. There was a right hand and foot preference. He was able to hop briefly on his right foot, but pain made it

impossible for him to do more, and he could not skip. His gait was antalgic. There was no glabellar response, but there was a positive nuchocephalic reflex. Rapid alternating movements were done reasonably well with his palms, fingers, and feet. Sensory examination of primary modalities was intact to vibration, position, and pinwheel, but he extinguished the distal of two simultaneously delivered stimuli on both the right side and the left side. Deep tendon reflexes were 2+ and equal throughout in the upper extremities and the knees but were barely perceptible at the ankles. Plantar responses were flexor bilaterally. There were negative Wartenberg reflexes bilaterally.

There was a positive snout. There was paratonia of both arms and both legs, and he was unable to carry out the Luria two step or three step commands. Cerebellar function as best as could be determined was normal. There was no grasp reflex.

There were scars in the left parietal region and a huge U-shaped on the forehead. There were three long longitudinal scars on his left forearm and his left index finger. He had tried to kill himself by cutting his arm and cutting off his left index finger.

Mini-mental status examination revealed that he did not know the year, the season, the month, or the day of the month, but did know the day of the week, Monday. He knew we were in Arizona but not county, town, or floor, but knew the unit in which he was held at the prison. He required one repetition to remember three words. After he encoded them, he got 2/3 at one minute. He was only able to do one correct subtraction of seven,

not from 100 but from 10. At first he said seven, but then he corrected this to three. He named a pencil and a watch, followed a three stage command. He is not able to read so that he could not read and obey, and he could not write a sentence. His attempt to copy a design was primitive and had evidence of constructional apraxia. He got a score of 13/30 on the mini-mental status exam. His illiteracy may have lowered the score beyond where it would have been had he learned to read and write.

Competency depends upon frontal lobe function and requires a minimal degree of intelligence. This subject is mentally retarded, his IQ 61, and his frontal lobe functions are impaired on neurologic examination.

I have made specific recommendations for neuropsychological assessment to include the Wisconsin Card-Sorting test and Trail-making A and B. His illiteracy may make these tests a challenge for Dr. Geffen. An MRI of his brain could help to explain why his brain is not working properly.

I think it likely that he cannot connect the crime with the punishment and does not understand the result of his punishment. He certainly cannot cooperate effectively in assisting his defense with pleas for executive clemency. He is both schizophrenic and retarded. He is not a fit subject for execution.

Sincerely,

/s/ Jonathan H. Pincus
Jonathan H. Pincus, MD
Professor of Neurology and
Chairman Emeritus

EXHIBIT D

AFFIDAVIT OF DR. JOSEPH GEFFEN

Comes now affiant, Joseph Geffen, Ph.D., and first being duly sworn, states and declares as follows:

1. I am a psychologist duly licensed to practice psychology in the State of Arizona. In that capacity, I have participated in the assessment of the mental condition of Mr. Ramon Martinez-Villareal.

2. My testing, and that of other mental health professionals, indicates that Mr. Martinez-Villareal is mentally retarded, brain damaged, and psychotic. I believe additional testing is necessary to determine the cause and extent of Mr. Martinez-Villareal's disabilities, especially given the gravity of the issues involved.

3. I have asked counsel for Mr. Martinez-Villareal to obtain a neurometric EEG, which measures brain functioning, and an MRI, which can create a visual image of the brain structure. Each test objectively assesses the condition and functioning of the patient's brain, but in different ways. The patient's frontal lobe is responsible for the higher order brain functions necessary to the patient's ability to understand that he is to be executed and why.

4. An MRI is necessary to help detect any structural abnormality of the brain that may account for the organic brain dysfunction indicated by neurological and neuropsychological testing and patient history. Mr. Martinez-Villareal has a history of head injuries, psychotic symptoms, inconsistent and erratic behavior, and autism observed and verified since early childhood. Prison

records reveal disorganized behavior, such as requesting and then refusing medication, that is commonly observed in patients suffering from psychotic and/or organic brain disorders.

5. A neurometric EEG measures electronic impulses produced by the brain. It records electronic activity in the brain which enables doctors to identify and evaluate brain functions. There are subtle defects in the brain that are not detected on traditional EEG testing. The quantitative EEG uses computerized, statistically validated norms to analyze the brain wave activity and create a visual image of brain functioning. By comparing patterns of the patient's brain functions to normative groups, it aids in determining the actual functioning of specific areas of the patient's brain. This is especially critical in examining Mr. Martinez-Villareal's frontal cerebral cortex, which is the seat of higher brain functions, including the ability to understand the abstract concepts necessary to understand the cause-effect relationship between the crime and the punishment.

6. Objective testing is especially important in this case because the issue of malingering has been raised, but is not substantiated with any objective clinical testing. The testing to date establishes beyond question that Mr. Martinez-Villareal's brain functioning is impaired; these additional tests could provide additional objective support for present clinical findings.

7. In addition to these tests, it would be important to obtain an examination by an expert in the area of mental retardation, preferably one who is bi-lingual. Having reviewed records in the prison and the reports of

DOC physicians, it appears that behavior consistent with mental retardation is being misinterpreted as indicia of competence. Traditional psychological tests for mental retardation are not available in Spanish, so it would be necessary to engage an expert with substantial experience with mentally retarded subjects. Although Mr. Martinez-Villareal is brain damaged and psychotic, his impairment is significantly exacerbated by his extremely limited intellectual functioning. An expert familiar with mental retardation is necessary to complete the clinical picture of this very impaired individual.

FURTHER, AFFIANT SAYS NAUGHT.

/s/ Joseph Geffen Ph.D.
Dr. Joseph Geffen, Ph.D.

State of Arizona)
) ss
County of Pima)

Subscribed and sworn before me this 8th day of April, 1997.

/s/ Ana illegible nee:Salcido
Notary Public

My Commission expires:
6-28-97

OFFICIAL SEAL
[SEAL] ANA SALCIDO
Notary Public – Arizona
PIMA COUNTY
My Comm. expires June 28, 1997

EXHIBIT E

SEAN D. O'BRIEN
5319 Rockhill Road
Kansas City, Missouri 64110
(816) 363-9371

BAR MEMBERSHIP: Missouri Bar; Federal District Court, Western District of Missouri; United States Court of Appeals, Eighth Circuit; United States Supreme Court

EDUCATION: University of Missouri-Kansas City, J.D., 1980; Northwest Missouri State University, B.A., English, Communications, highest honors, 1977.

APPOINTMENT AND POSITIONS: Executive Director, Public Interest Litigation Clinic (formerly the Missouri Capital Punishment Resources Center). The Clinic represents death row inmates in all stages of trial and appeal. (October, 1989 – present)

Adjunct Professor, UMKC School of Law. Courses taught since 1985 include Problems and Issues in the Death Penalty, Death Penalty Representation Clinic, Public Defender Trial Clinic, Public Defender Appeal Clinic.

Public Defender, Jackson County, Missouri. Director of an urban public defender office representing poor people in all varieties of

criminal proceedings. (January, 1985 – September, 1989)

Assistant Public Defender, Jackson County, Kansas City, Missouri. Defended poor people in felony cases, including death penalty defense, in trial, appeal and postconviction proceedings. (March, 1981 – December, 1984).

President, Missouri Association of Criminal Defense Lawyers, 1992-93

Missouri Alliance for the Mentally Ill, Chair, Forensic Committee, 1992-present

Chairman, Missouri Bar Criminal Law Committee, 1989 – 1992

PROFESSIONAL AWARDS:

Missouri Association for Social Welfare, Annual Award, 1994

Missouri Coalition to Abolish the Death Penalty Annual Award, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. **TERRY STEWART, et al.,** Respondent.	No. CIV-86-296-TUC-RMB **ORDER** (Filed May 14, 1997)

Petitioner has filed with this court a Motion for Expert Services and/or Access to Client and Appointment of Counsel. The Petitioner does not presently have a claim pending before this Court. Previously, the Petitioner brought a claim before this Court regarding his competency to be executed and other issues. The Court ruled on the other issues and denied the claim regarding competency to be executed, finding that the competency to be executed claim was premature because, at that time, an execution date had not been set. *See* Order and Memorandum Opinion dated October 21, 1994. An execution date of May 21, 1997 has now been set, and Petitioner plans to reinstate his claim regarding his competency to be executed.

Title 21 U.S.C. § 848(q)(4)(B) entitles capital defendants to legal representation in proceedings pursuant to 28 U.S.C. § 2254 or § 2255. The Supreme Court has stated that § 848(q)(4)(B) provides that "the right to appointed counsel adhere prior to the filing of a formal, legally sufficient habeas corpus petition." *McFarland v. Scott*, 512

U.S. 849, 855, 114 S.Ct. 2568, 2572 (1994). Accordingly **IT IS ORDERED** that the Federal Public Defender for the District of Arizona and Sean D. O'Brien **SHALL BE APPOINTED** to represent the Petitioner in habeas corpus proceedings before this Court. **IT IS FURTHER ORDERED** that this Court will hold a telephonic hearing regarding the Motion for Expert Services and/or Access to Client on May 15, 1997 at 2:30 p.m.

Dated this 14th day of May, 1997.

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States
District Judge

GRANT WOODS
ATTORNEY GENERAL

BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPEALS SECTION
400 W. CONGRESS, BLDG. S-315
TUCSON, ARIZONA 85701-1367
TELEPHONE: (520) 628-6504
(STATE BAR NUMBER 003544)

ATTORNEYS FOR RESPONDENTS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, PETITIONER, -vs- TERRY L. STEWART, et. al, RESPONDENTS.	PREVIOUS CAUSE NUMBER: CIV 86-296-TUC-RMB[1] RESPONSE TO MOTION FOR EXPERT SERVICES AND/OR ACCESS TO CLIENT AND APPOINTMENT OF COUNSEL

Respondents oppose this motion for several reasons, and urge this Court to deny all of the requested relief.

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[1] Inasmuch as CIV-86-296 has come to an end through the appellate decision and mandate of the Ninth Circuit, and this Court's order of March 24, 1997, denied Petitioner's "Motion to Reconsider Order and Judgment," it is certain that that case is complete, and that anything more which will be litigated in this Court constitutes a new, yet-to-be-filed case. Hence, some means of referring to such new activity, which will not confuse it with the finalized first petition, should be applied.

1. *Because this is* [sic] *motion contemplates a successive petition, this Court lacks jurisdiction to take any action.* It is undisputed that Petitioner has already had one federal habeas proceeding, which has been litigated to its conclusion. This Court has recognized as much in its prior orders of May 6 and May 8, 1997. Therefore, the litigation Petitioner is attempting to initiate now plainly is a successive petition, subject to the requirements of 28 U.S.C. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, and this Court is forbidden to entertain it in any fashion, since Petitioner has not obtained permission from the Ninth Circuit to proceed.

Counsel for Respondents is aware that the Court stated in its order of March 24, 1997, that it did not intend to treat the "incompetency to be executed" claim as a successive petition. However, recent authority not mentioned in that order and probably unknown to the Court indicates that Petitioner's competency to be executed claim should be treated as successive, regardless of the fact that it may not have been "ripe" when presented in Petitioner's first petition. That the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" is only part of the requirements for excepting a petition from the rule against successive petitions; it must also be shown that if the facts underlying the claim were proved, "no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

The Ninth Circuit has recognized the clear intendment of this language, that claims related only to sentence, even a death sentence, simply cannot be entertained in a successive petition. *Greenawalt v. Stewart*,

105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1977) (allegation of ineffective assistance of counsel in capital sentencing not permitted as successive petition); *Greenawalt v. Stewart*, 105 F.3d 1287, 1288 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1977) (denying permission to file a successive petition which would attack lethal injection as mode of execution because it "is not relevant to the question whether he is guilty of murder in the first degree"). Following the clear statutory language and the two *Greenawalt* holdings, the Eleventh Circuit specifically ruled that a claim of incompetency for execution under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), cannot be raised in a successive petition. *In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir. 1997).

It therefore is clear that what is contemplated is a successive petition, which this Court lacks any authority to deal with.

> Instead of filing a pleading in the district court attempting to evade the provisions of 28 U.S.C. § 2244(b), as amended, Medina should have begun by filing in this Court an application seeking a certificate permitting him to file a second application in the district court, as required by § 2244(b)(3)(A). Because Medina did not obtain such a certificate, the district court correctly dismissed his habeas application, denied his motion for a stay of execution, and denied his application for a certificate of appealability.

(*Id.* at 1564.) The same is true of Petitioner. Nor does it make any difference that what is being sought is appointment of counsel and funding of experts, as supposedly

authorized by 21 U.S.C. § 848(q)(4), construed in *McFarland v. Scott*, ___ U.S. ___, 114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994). *McFarland* involved neither unexhausted claims nor a successive petition, both of which are present here. Moreover, all of the relevant statutes must be read together, *Sterling v. Scott*, 57 F.3d 451, 456-58 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996). Section 848(q)(8) says that counsel appointed pursuant to that statute shall represent the person in *"available* judicial proceedings," including *"available* post-conviction process." Unless the Ninth Circuit grants permission to proceed with the successive petition, there simply is no "available" process, and no basis for either appointment of counsel or any of the other relief requested.

This conclusion is reinforced by the recognition that the only purpose for appointing experts and authorizing funding for testing is to hold an evidentiary hearing in this Court. However, § 2254(e)(2)(B) of the amended habeas statute allows for evidentiary hearings in the district courts only if there has been a failure to develop a factual basis in the state courts *and*, again, the applicant shows that no reasonable fact finder would have found him *guilty*. Thus, there can be no evidentiary hearings in this Court, whether the petition is successive or not, on an issue unrelated to the determination of guilt. Competency for execution certainly does not qualify. This Court is not authorized to engage in a futile expenditure of federal funds where no federal evidentiary hearing can ever take place.

2. *This Court cannot authorize expenditures concerning an unexhausted claim.* It is undisputed that this claim remains unexhausted; Petitioner has a petition for special

action pending in the Arizona Supreme Court seeking review of the trial court's determination of competency, as authorized by the statute, A.R.S. § 13-4022(G). As support for his contention that this Court possesses jurisdiction to grant the orders he seeks, Petitioner cites just two authorities. (Motion at 5.) One is *McFarland v. Scott*, which we have already seen is distinguishable by the fact that it involved neither a successive petition nor one including an unexhausted issue. The other is *Calderon v. U.S. Dist. Ct., Eastern Dist. of California*, 1997 WL 183877 (9th Cir. Apr. 16, 1997.). It, too, involved a first petition, not a successive one. It remarks that the district court's dismissal of a mixed petition (so that there was no formal petition pending) did not, in and of itself, require denial of fees under Section 848(q), because *McFarland* determined that a mere request for counsel was enough to initiate a proceeding. (*Id.* at *6.) However, it then went on to state:

> The district court is not required to grant the application, however. *See Sterling v. Scott*, 57 F.3d 451, 457-58 (5th Cir. 1995) (affirming decision that section 848(q)(9) fees request did not survive dismissal of mixed petition), *cert. denied*, ___ U.S. ___, 116 S. Ct. 715, 133 L.Ed.2d 669 (1996).

(*Id.*) The result is ambiguity, because the decision seems to say both that a district court can "consider" a fees application in a case where there is an unexhausted claim, and that the existence of an unexhausted claim is an appropriate ground for terminating fees. What *is* clear is that on at least three other occasions the Ninth Circuit has granted mandamus, directing that discovery orders

be vacated because there was no properly exhausted petition pending in the district court, and prohibiting the issuance of such orders until such a properly exhausted petition was filed. *Calderon v. U.S. Dist. Ct., Northern Dist. of California (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996); *Calderon v. U.S. Dist. Ct., Northern Dist. of California (Hill)*, 110 F.3d 714 (9th Cir. 1997); *Calderon v. U.S. Dist. Ct., Eastern Dist. of California*, 1997 WL 219500 (9th Cir. May 5, 1997). Thus, the great weight of authority in this circuit holds that there is no right to discovery orders, absent a fully exhausted petition, and that should be true, regardless of the particular mechanism for discovery which a petitioner attempts to utilize. In *Shaw v. Delo*, 971 F.2d 181, 188 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1301 (1993), the Court of Appeals concluded that a competence for execution claim should have been dismissed by the district court, because it had not been exhausted in the state courts, and "Because the merits of Shaw's incompetence claim were not properly before the district court, we also conclude the district court correctly denied Shaw's motion for funds for investigative and expert services to determine his competence to be executed." These cases strongly indicate that to grant what Petitioner requests would amount to a clear error of law.

3. *Even if the Court possesses authority to fund the tests and experts Petitioner requests, to do so would be an abuse of the Court's discretion.* The very same requests presented to this Court were presented to Judge Boyd Johnson of the Pinal County Superior Court and denied by him. Those were correct rulings and, even if this Court believes it possesses the authority to grant Petitioner's requests, it too should deny them.

Two types of testing are being requested. (Motion at 6.) The first sort is magnetic resonance imaging (MRI) of Petitioner's brain. However, in a report which Petitioner has not supplied to the Court, Petitioner's own affiant, Dr. Geffen, conceded that, "Although an MRI test could be useful, the results would mostly shed light with respect to 'structural' abnormalities of the brain as opposed to functional ones." (Exhibit 1 hereto at 5.) This amounts to a concession that the MRI testing will not produce any relevant information, because this Court is no more concerned with obtaining abstract information about the structural abnormalities of Petitioner's brain than Judge Johnson was, but only with the single narrow issue of whether he understands that he is to be executed because he has been convicted of murder. If anything, that is a "functional" issue, which Geffen says the MRI will not address. Thus, the delay (undoubtedly the real point of this motion), transportation difficulties, etc., involved in arranging for such testing of Petitioner would be utterly pointless.[2]

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[2] The addition of Dr. Jonathan Pincus' letter as support for the MRI (Motion at 6 and Exhibit C) should not influence this Court. Dr. Pincus is virtually a professional defense witness in capital cases. *Bonin v. Calderon*, 807 F. Supp. 589, 598 n.9 (C.D. Cal. 1992). The IQ he states, 61, is an error, as he admitted at the hearing; it is a misquotation of Dr. Geffen's report to this Court, which found an IQ of 64. That level is merely "mildly" retarded. DSM IV at 40. A recognized neurologist from Phoenix testified to Judge Johnson that the additional tests would not provide an answer to the question being asked (competency for execution); "Saying that somebody has frontal lobe damage or brain damage, saying that somebody is mentally retarded, it does not really address that issue in any specific way." (Ex. 2 at 75, 71.)

The situation is similar with regard to the other sort of testing suggested, the "neurometric EEG," which Geffen's report at 5 indicates is also known as "computerized EEG" or "brain mapping." This Court should know that the Arizona Court of Appeals upheld exclusion of "brain electrical activity mapping (BEAM)" evidence in a first degree murder case, where the system was described as "a computerized method of displaying and interpreting EEG . . . data," because "there was substantial evidence from which the court could conclude that BEAM is not generally accepted in the neurological community." *State v. Zimmerman*, 166 Ariz. 325, 327-29, 802 P.2d 1024, 1026-28 (Ct. App. 1990). As a merely experimental procedure, it was not something the court needed to receive as evidence. (*Id.*) The same result was reached in the only other case concerning brain mapping discovered by counsel for Respondents, *Head v. Lithonia Corp., Inc.*, 881 F.2d 941 (10th Cir. 1989). Thus, Petitioner wishes this Court to grant a stay of his execution to allow for testing of a sort not even accepted within the relevant medical circles. The Court should also be aware that a regular EEG was conducted of Petitioner in 1993, and found to be normal. Strangely enough, Dr. Geffen's affidavit does not even mention that test, let alone explaining the need now to have another EEG, let alone one which is merely experimental in nature.

Equally unpersuasive is the request for an evaluation by Dr. Dennis Keyes. Dr. Keyes is touted as an expert in the area of mental retardation. The Court should recall that the defense has already had Petitioner examined by the following experts, who testified on his behalf: Dr. Geffen (psychologist); Dr. Garcia-Bunuel (psychiatrist);

Dr. Imaz (psychiatrist); and Dr. Pincus (neurologist). None of those individuals was reticent about expressing an opinion that Petitioner suffers from mental retardation or some other organic brain defect and, of course, the witnesses presented by the State before Judge Johnson – two psychiatrists (Drs. Kurke and Johnson), a psychologist (Dr. McCauley), and a neurologist (Dr. Tamm) also discussed the matter. Thus, the matter was fully explored in the state court proceeding. Keyes is not necessary, he is redundant. The issue of malingering which the motion posits as a reason for bringing Keyes in at this late date has been disputed by the parties for years (as this Court knows from the hearing held before it in 1994), so it is not some sudden and unforeseen new development which could not have been dealt with before.

The pointlessness of appointing Keyes is evident. Paragraph 7 of Geffen's affidavit (Motion Exhibit D) suggests that Petitioner be examined yet again, by "an expert in the area of mental retardation, preferably one who is bi-lingual." The Geffen affidavit ignores the fact that a bilingual examiner – himself – has twice attempted to go beyond mere interviews to conducting psychological testing of Petitioner and has been essentially unsuccessful on both occasions. His report of 10/31/93 discounted the results of both the IQ test and "test for screening for organic impairment of brain functions" administered on that occasion because of the "psychotic processes" supposedly then operating, and his most recent report (dated 4/2/97) indicates that Petitioner claimed inability to do tests because of poor eyesight. The Court may recall that Petitioner cooperated with Dr. Youngjohn in 1994 for only a brief time and then walked out of the examination. Dr.

McCauley testified that she was prepared to do some testing of Petitioner as part of her evaluation, but he refused to cooperate. Thus, Petitioner's cooperation even with his own experts has been minimal, and he has made clear his determination not to cooperate at all in testing conducted by Respondent's experts.

Thus, the likelihood of obtaining any reliable information from Petitioner by means of psychological testing is negligible, but it is precisely such testing which is Keyes' forte. One case involving another death-sentenced defendant lists half a dozen tests administered by him to that prisoner (which was not an exhaustive list), and concludes that the result was "a thicket of numbers, acronyms, and medical terminology" which was "inconclusive" and "indeterminate at best." *Fairchild v. Lockhart*, 900 F.2d 1292, 1297-98 and n.5 (8th Cir.), *cert. denied*, 497 U.S. 1052 (1990). This apparently is Keyes' typical mode of operation. In a more recent death penalty case, his testimony (and that of another defense witness) were discounted on the bases that, "Both doctors spent the bulk of their interview time with [the defendant] administering tests," rather than talking to that defendant, and that these witnesses "always testified for the defense." *Washington v. Johnson*, 90 F.3d 945, 952 (5th Cir. 1996). In neither case was his testimony found persuasive. And nothing in the Motion suggests that he is bi-lingual, one of the primary qualifications for an additional expert suggested by Geffen.

Nothing in the Motion gives any reason to believe that Keyes will be able to accomplish anything more with Petitioner than conduct another interview (which is simply repetitive of what half a dozen other experts already

have done), and even if some testing could be accomplished by him, the virtual certainty that Petitioner will not cooperate with any non-defense person attempting similar testing would cause an unfair disparity in access to evidence which would be grounds for precluding the evidence. The Vineland Scale as described in the Motion at 7 apparently is just a structured interview of people who have had contact with the subject, and no good reason is provided why this could not have been done years ago by Geffen (who has been involved with Petitioner's case since 1993) or some other local expert. Hence, there is no reason to believe that anything helpful will be accomplished by the appointment of Keyes.

CONCLUSION

The Court does not possess the jurisdiction to issue the orders which the Motion requests, and even if it did, the reasons presented for doing so are so meritless that granting the motion would constitute an abuse of discretion. This motion is a transparent attempt to achieve a backdoor stay of execution and the Court should not lend its dignity to such gameplaying. The requests should all be denied and Petitioner directed to take the issue to the Ninth Circuit, where it should have been presented in the first place.

DATED this 14th day of May, 1997.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/s/ Bruce M. Ferg
BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR RESPONDENTS

COPIES of the foregoing were FAX'd and deposited for mailing this 15th day of May, 1997, to:

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/s/ Mary Lou Reinhardt
MARY LOU REINHARDT

CRM86-0720
CR860720.ex2

EX. 1

* * *

performed. Although an MRI test could be useful, the results would mostly shed light with respect to 'structural' abnormalities of the brain as opposed to functional ones. I communicated to the client's attorney that I would specially recommend a specific procedure (computerized EEG, also known as neurometric EEG, 'brainmap' and qEEG), since the question of malingering was raised. This

procedure does not depend on any client self report, but is based on fairly direct measurement of electrical activity of the brain and comparing the results to computerized norms for patients with affective, psychotic, and organic disorders, as well as normal individuals.

In normative mental health treatment of schizophrenic and other psychotic patients, medication begins to be given very early even if the diagnosis has not been definitely confirmed, on a presumptive basis, in order to reduce the patients' suffering and help them become less disorganized. It is puzzling to me why Mr. Villareal is not being medicated at this stage, when the question of his competence to be executed is being raised. Perhaps the medication could help him to become competent, if he is not.

Regarding the report of 'malingering,' I am not satisfied, based on the record and the interview observed, that any credible psychological evaluation was performed upon which such a conclusion could be based. In fact, it is incredible that with all the history revolving around Mr. Villareal's behavioral problems and the many years in the institution, that there is no report of any formal psychological evaluation performed by the institutional mental health staff. What little assessment seems to have been reported, there is a glaring absence of Spanish Language or culturally sensitive professional treatment other than by paraprofessional staff, even though the psychological and psychiatric literature has maintained for quite some time that this should be the standard for language and cultural minority patients. If there is not adequate appropriately trained staff at the facility to provide evaluations meeting such standards, this could have and still can be

obtained by drawing from outside resources. There are Spanish speaking psychiatrists and psychologists in the Tucson, Phoenix and Casa Grande areas who are available to be called in.

Finally, I would like to comment regarding my understanding that legally, those being asked by the condemned prisoner's attorney, through a court order, to provide an evaluation to determine competence to be executed be given full access to all the information that is obviously available to the institutional staff serving the prosecutor. In my opinion this was not followed in this case either in the letter or the spirit of the law, from my standpoint; it was a matter of "too little and too late." Given the available data, it is my opinion that Mr. Villareal does not meet the mental standard that would correspond

* * *

EX. 2

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PINAL

STATE OF ARIZONA, Plaintiff, vs. RAMON MARTINEZ-VILLAREAL, Defendant.	)	No. CR 97-022291

BEFORE THE HONORABLE BOYD T. JOHNSON

Florence, Arizona
May 7, 1997
8:40 o'clock a.m.

PREPARED FOR:
ATTORNEY GENERAL
(Copy)

Mesa Court Reporting
265 North Gilbert Road, #2151
Mesa, Arizona 85203
(602) 964-8507
By: Leisel Akins, RPR

* * *

[p. 71] seen of the reports, that the defendant is not competent?

I believe in answer to the question Mr. O'Brien asked you, you couldn't rule out that he was incompetent but you can't also rule out, can you, Doctor, that he is competent?

A That's correct. That's correct.

Q So, in other words, if we ask the other half of the question that Mr. O'Brien didn't ask, is that you can't rule out the fact that he's competent; is that correct?

A You're correct, yes.

Q And it's also true, is it not, Doctor, that the diagnoses of Dr. Pincus do not preclude the finding that the defendant is competent to be executed; is that correct?

A No. None of these diagnoses really addresses that issue. Saying that somebody has frontal lobe damage or brain damage, saying that somebody is mentally retarded, it does not really address that issue in any specific way.

Q So that doesn't preclude the finding by this Court that he's competent to be executed; is that correct?

A That's correct.

* * *

[p. 75] determination. That was your question?

MR. WILKES: Right. And I wanted the doctor to answer that.

THE COURT: Well, what I'm going to do, sir, is, I'm going to answer it and say that when reviewing all the reports, I made the determination in my ruling of whether I refuse or decline to order additional testing, that it was not relevant. And I based it in part on what Dr. Tamm put in his report, plus other information available to me.

Does that satisfy what you want for a record?

Dr. Tamm, would you say it's not – it would not be beneficial to have those additional tests?

THE WITNESS: I don't think it will tell you – I don't think it will give you the answer to the question you're asking.

THE COURT: Okay.

MR. WILKES: I have no further questions.

THE COURT: And that was an offer of proof. I am not taking that testimony itself. I have relayed on the record what my decision was, was to not have the additional testing.

MR. BRUNER: Judge, can I just get the last word on that in?

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY STEWART, et al., Respondents.	**CAPITAL CASE** **EXECUTION SCHEDULED FOR 5-21-97** No. CIV-86-296 TUC RMB REPLY TO RESPONSE TO MOTION FOR EXPERT SERVICES AND/OR ACCESS TO CLIENT AND APPOINTMENT OF COUNSEL AND SUPPLEMENTAL EXHIBIT

Counsel for petitioner attempted to challenge his competence for execution before this Court in 1994. At that time, respondent objected on the grounds that the issue was not ripe, and that is should be raised at a later

time. Now respondent has changed his position, saying that the competence issue cannot now be raised in a "successive" petition because it is unrelated to his guilt or innocence of the crime. If examined literally, respondent's argument is that the Antiterrorism and Effective Death Penalty Act effectively deprives all federal district courts of jurisdiction to enforce the Eighth Amendment prohibition on the execution of the insane. Nothing in the legislative history or text of the statute indicates an intent to divest the federal courts of jurisdiction to enforce any right recognized under the federal constitution.

The constitutional nature of the right at issue in this case is not open to question. The Supreme Court has definitively ruled that the Eight [sic] Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986). Since *Marbury v. Madison*, the power and duty of the federal courts to enforce the constitution has been beyond dispute. Though some restrictions were placed upon the writ of habeas corpus in the recent legislation, Congress continued to respect the role of federal courts to interpret the Constitution:

> In the great 1803 case of Marbury v. Madison, Chief Justice John Marshall explained for the Supreme Court that "it is emphatically the province and duty of the judicial department to say what the law is." Section 104(3) would be subject to serious constitutional challenge if it were red [sic] to preclude the Federal Courts from making an independent determination of "what the law is" in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to

> avoid constitutional problems, will read section 104 to permit independent Federal Court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal Laws.

Statement by President William Jefferson Clinton upon signing S. 1965, April 24, 1996, 1996 WL 517206. Respondents, however, seeks to limit the power of this Court by procedural artifice – first by defending the issue in prior proceedings on the ground that it should be raised now, and now claiming that it should have been ruled upon then. As discussed below, in a similar situation, the seventh circuit recently rejected a state's abuse of the writ of argument that "would have the effect of mouse trapping [the petitioner]." *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc).

Here, after successfully persuading this Court in the earlier proceedings in this matter that Petitioner's claim that he was incompetent to be executed was "not now ripe for determination" and should be brought when an execution "warrant has been issued," *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45-46 (Dec. 17, 1993), Respondents now take a completely contrary position and claim that this claim is now too late, and can never be heard by a federal court. Respondents do so despite the fact that Petitioner did exactly as Respondents, and this Court, told him to do: reassert this claim after a warrant of execution issued. Petitioner is scheduled to be executed at 12:05 a.m. on May 21, 1997.

On these facts, there is no question but that Respondents are judicially estopped from taking this inconsistent position in this Court. As the Ninth Circuit has explained,

> the doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.

Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). The doctrine is "intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts." *Helfand v. Gerson*, 105 F.3d 530, 533 (9th Cir. 1997) (quoting *Russell v. Rolfs*, 893 F.2d at 1037). In *Russell*, the Ninth Circuit applied the judicial estoppel doctrine to prevent the state from taking a directly contrary position under circumstances strikingly similar to those presented here. There, the state "persuaded the district court to deny [the habeas corpus petitioner] federal review on the ground that he had an 'adequate and available' state remedy" to exhaust his claim. *Id.*, at 1038. However, once the petitioner returned to state court, the state "disregarded its previous representation in federal court and argued the petition was procedurally barred because [the petitioner] had raised the same issues on direct appeal." The state court ultimately agreed, and found the claim procedurally defaulted. However, when the petitioner returned to federal court, the state argued that the petitioner "was procedurally barred from presenting his claim in federal

court." *Id.* at 1037. The appellate court held that the state's earlier action estopped it from taking this entirely different position. *See also, Yniguez v. State of Arizona*, 939 F.2d 727 (1991) (Attorney General judicially estopped from "about-face" where he sought "an outcome [in the appellate court that was] directly contrary to the result he sought and obtained in the district court").

Respondents contend that the changed circumstances brought about by the amendments to 28 U.S.C. § 2244(b) contained in the Antiterrorism and Effective Death Penalty Act ("AEDPA") support their "about-face." That contention is unavailing. As another circuit court recently explained when a state offered a similar argument following passage of the AEDPA:

> Application of the new law to [petitioner's] case would, thus, . . . have the effect of mousetrapping [the petitioner]. It would cause him to forfeit a legal remedy on which his life, may literally depend."

Burris v. Parke, 95 F.2d at 469. In *Burris*, the petitioner filed a federal habeas corpus action challenging only his conviction because the appeal from his capital resentencing hearing was still pending in the state courts. After his habeas petition was denied by the federal courts, the petitioner filed a second federal habeas petition challenging his now exhausted capital sentencing claims. While the second habeas petition was pending on appeal, the AEDPA was enacted. *Id.*, at 467-468. The state claimed that because the AEDPA did not allow challenges to sentences in a second habeas petition, the petition had to be immediately dismissed.

The circuit court, however, concluded otherwise. It found that the new changes contained in the AEDPA did not apply to Burris because at the time the first habeas petition was filed, all parties, including the state, believed Burris could file a second petition challenging his sentencing issues once they were exhausted in the state courts. The court noted that the hearing transcript on the first petition gave "no hint" that proceeding this way "might have precluded [Burris from] filing a second petition limited to the sentence, and in fact the "silences are deafening." Under these circumstances, the court concluded that:

> the state's silence concerning the implications of an immediate decision on the petition was tantamount to a statement that for the sake of a prompt decision on the merits of Burris's challenge to his conviction the state would forgo the defense of abuse of the writ should he file a subsequent petition limited to the sentence.

Id., at 470. As a result, the "state forfeited any defense" preventing the claims to be heard on the merits in the second petition.

Here, the state was not silent. It forcefully and vociferously argued that Petitioner's competency to be executed claim was premature, and as a result the Court did not yet have jurisdiction to here [sic] it:

> [T]his issue is not ripe for decision, because no execution can take place without the issuance of a warrant of execution, no such warrant concerning Petitioner presently exists, and the Arizona Supreme Court apparently is not issuing such warrants concerning defendants who are protected (as is Petitioner) by a federal stay of

> execution. Moreover, mental competency, of course, can change over the course of time. Thus, the claim presents nothing more than a possibly future injury, which is insufficient to satisfy the Art III 'case or controversy' requirement, and there currently is no issue over which this Court properly has jurisdiction."

Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45 (Dec. 17, 1993). Claiming Petitioner's desire to have the claim decided at that time was "unworkable," Respondents stated that it was important to:

> have a single adjudication of competency, *at a time when all [petitioner's] other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.*

Id.

Now that everyone has relied on this position, including Mr. Martinez-Villareal whose very life depends on his reliance, this Court should hold Respondents estopped from taking this "about-face."

Just as it is clear that the proceeding in this Court is not a successor corpus proceeding,[1] so too is it clear that

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[1] Respondents are also wrong in their contention that counsel cannot be appointed in a successor habeas petition. *Weeks v. Jones*, 100 F.3d 124, 128 (11th Cir. 1996) (district court erred legally and procedurally in denying appointment of

this Court has the authority to appoint counsel, which has been done, and to consider the issues now before the Court. Mr. Martinez-Villareal has "a right to preapplication legal assistance . . . in federal habeas corpus proceedings[,]" and this assistance extends to services that may be critical in the preapplication phase of a habeas corpus proceeding. *McFarland v. Scott*, 512 U.S. 849, ___, 114 S.Ct. 2568, 2572 (1994) *citing* 21 U.S.C. § 848(q)(9); *see also Calderon v. United States District Court for the Eastern District of California (Gordon)*, ___ F.3d ___, 1997 WL 183877, at *1, *6 (9th Cir. Apr. 16, 1997) (A post conviction proceeding within the meaning of § 848(q)(4)(B) begins upon the filing of a motion requesting the assistance of counsel and the court has discretion to provide counsel with assistance to prepare for federal habeas efforts.) *McFarland* and *Gordon* are not at all ambiguous. The assistance Mr. Martinez-Villareal is now seeking is available under the law.

Respondents' attempt to have this Court dismiss Mr. Martinez-Villareal's meritorious constitutional claims without the benefit of resources authorized under 18 U.S.C. § 848 is also inconsistent with the power of this Court to provide indigent litigants the resources to challenge an unconstitutional sentence of death. Again, the statute has not rendered this Court impotent with respect to the adjudication of the factual aspects of a constitutional claim. Again, the President observed:

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counsel in successor habeas petition challenging capital defendant's competency to be executed).

> Section 104(4) limits the evidentiary hearings in Federal habeas corpus cases when "the applicant has failed to develop the factual basis of a claim in State court proceedings." If this provision were read literally to deny litigants a meaningful opportunity to prove the facts necessary to vindicate their constitutional rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which "the applicant has failed to develop the factual basis" of his or her claim. Therefore, section 104(4) is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in state court.

Statement by President William Jefferson Clinton upon signing S. 1965, April 24, 1996, 1996 WL 517206. Petitioner seeks only those resources which he requested and was denied by the state courts, and which are relevant to the issue-injected by the state – of whether he has the mental faculties to successfully dupe treating physicians for almost ten years.

The issue of mental retardation and malingering is important in this case in light of the circular reasoning of the state's experts – that Mr. Martinez-Villareal's manipulative behavior, itself a symptom of retardation and brain damage – proves his awareness of his crime and punishment. The services of an expert in mental retardation is critical to a reliable resolution of this issue. As Dr. Denis W. Keyes, Ph.D., explains in his letter to Sean D. O'Brien, dated May 13, 1997, attached as Exhibit F, and offered as further support for the requests made in ¶¶ 10, 10.1, 10.2 and 10.3 of the Motion for Access:

> The reports of Dr. Joseph Geffen, Dr. Jonathar. Pincus, and Dr. Leonardo Garcia-Bunuel are exceptional examples of thorough mental health examinations that strongly indicate the existence of mental retardation. However, none of these can be considered conclusive in their diagnoses since each lacks a formal evaluation of the client's adaptive skill functioning (see AAMR, 1992; DSM IV, 1994) . . .
>
> Testing procedure for people who have mental retardation require advance planning in several areas. People with mental retardation often attempt to "pass" for normal by assuming a posture of false-awareness and false-ability, known as the "Cloak of Competence" (Edgerton, 1966). For most people with little or no experience in the field of mental retardation, including many mental health professionals, this usually harmless deception may sometimes appear to be behavior one might merely regard as eccentric. . . .
>
> Conversely, examiners, particularly those with little or no experience working with people who have retardation, have sometimes accused examinees of malingering or faking mental retardation . . .
>
> The most glaring omission in each and all of the previously performed evaluations is the complete lack of any type of adaptive behavior scale or instrument. As stated, it is impossible to determine the existence or severity of mental retardation in an examinee unless his/her adaptive behavior (or adaptive skill levels) have been investigated.

Exhibit F, attached.

Because the State's witnesses in this case are clearly not familiar with mental retardation, much of Petitioner's behavior which is attributable to this serious disability was dismissed as evidence of malingering. The fact that Respondents refer to Mr. Martinez-Villareal's mental retardation as "merely mild" reflects a lack of understanding of the nature and severity of Petitioner's intellectual limits. Dr. Keyes could explain that mild mental retardation simply describes Mr. Martinez-Villareal with respect to other mentally retarded persons and that compared with individuals of normal intellectual functioning, he is severely impaired. Furthermore, it is unfair to dismiss Dr. Keyes' credibility without giving him an opportunity to evaluate Mr. Martinez-Villareal and testify simply because he has provided testimony in other cases. Respondents neglect to mention one case in particular, *In the Matter of Charles Lee Mathenia,* in which a Missouri Associate Circuit judge relied upon Dr. Keyes's testimony in finding a condemned prison [sic] incompetent for execution based solely on "mild" mental retardation.

This Court's earlier ruling that the *Ford* issue in this case is not successive or abusive should stand. It is consistent with the majority of courts that have considered the issue:

> Moreover, our research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be executed claim on grounds of abuse of the writ.

Barnard v. Collins, 13 F.3d 871, 878 (5th Cir. 1994). That case also held that the district court abused its discretion in refusing to extend to Barnard the benefit of 18 U.S.C.

§ 848, which provides for the appointment of counsel and reasonably necessary investigative, expert and other services. *Id.* at 879.

In conclusion, petitioner asks this Court to reject Respondents' attempt to finesse the jurisdiction of this Court to enforce the constitution.

Respectfully submitted this 15th day of May, 1997.

Fredric F. Kay
Federal Public Defender
Denise I. Young
Dale A. Baich

Sean D. O'Brien

By /s/ Denise I. Young
COUNSEL FOR PETITIONER

Copy of the foregoing mailed and
transmitted by facsimile on
this 15th day of May, 1997 to:

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/s/ Denise I. Young

EXHIBIT F

Denis William Keyes, Ph.D.
Department of Educational Foundations
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School of Education – The College of Charleston
Charleston, South Carolina 29424

Mr. Sean O'Brien, J.D.
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110

re: Arizona v. Ramon Martinez-Villareal

May 13, 1997

Dear Mr. O'Brien,

My name is Denis William Keyes, and I am currently a tenured faculty member in the Department of Educational Foundations and Specializations at the University of Charleston, South Carolina. I received my Doctor of Philosophy Degree in Special Education from the University of New Mexico in May, 1992. I also hold a Master of Education in Special Education, a Master of Science and an Educational Specialist Degree in School Psychology from Miami University, Oxford, Ohio. I have worked in the field of mental retardation since 1974, was a teacher of students who have mental retardation from 1979 to 1984. I have been state certified as a school psychologist since 1988 (in Ohio, New Mexico (sic), and South Carolina), Nationally Certified since 1989, and am a Diplomate of the American Board of Forensic Examiners. I have consulted for numerous legal protection and advocacy agencies (particularly in the areas of mental retardation, special education and the criminal justice system), and have testified as an expert witness in both criminal and

civil justice suits in both state and federal courts. In my research, I have published several articles in the field of mental retardation, most of which deal with legal issues. Since 1988, I have been active in cases involving the death penalty and offenders with mental retardation. I should like to preface my statement by saying that I am not particularly against the imposition of the death penalty either personally, morally, or philosophically. However, I am vehemently opposed to the execution of people who have mental retardation.

I am making this statement concerning the case of *Arizona vs. Ramon Martinez-Villareal*. My concerns about this case are myriad, first and foremost because there is enough evidence to suggest that this man has mental retardation, but none of the examinations performed so far have included all the areas of assessment necessary for a proper diagnosis. Additionally, any finding that Mr. Martinez-Villareal is competent cannot be considered exhaustive until his actual mental functioning has been determined beyond a reasonable doubt.

The reports of Dr. Joseph Geffen, Dr. Jonathan Pincus, and Dr. Leonardo Garcia-Bunuel are exceptional examples of thorough mental health examinations that strongly indicate the existence of mental retardation. However, none of these can be considered conclusive in their diagnoses since each lacks a formal evaluation of the client's adaptive skill functioning (see AAMR, 1992; DSM IV, 1994).

There are several important facts to consider in any diagnosis of this man's mental condition:

1. Ramon Martinez-Villareal has experienced extreme poverty;
2. He is culturally very different from most American citizens;
3. He is a Mexican National who speaks virtually no English;
4. He is diabetic, a disorder of metabolism that can cause progressive damage to the brain;
5. He is functionally illiterate and has had no formal education;
6. He has been diagnosed as paranoid schizophrenic, a severe mental illness that can lead to mental retardation (see AAMR. 1992);
7. He is described as both mentally retarded & capable by various psychologists who have limited, if any, experience with mental retardation; and,
8. He has evidenced concrete, circular and illogical thought processes.

Testing procedures for people who have mental retardation require advanced planning in several areas. People with mental retardation often attempt to "pass" for normal by assuming a posture of false-awareness and false-ability, known as the "Cloak of Competence" (Edgerton, 1966). For most people with little or no experience in the field of mental retardation, including many mental health professionals, this usually harmless deception may sometimes appear to be behavior one might merely regard as eccentric. In Mr. Martinez-Villareal's case, his 'cloak of competence' may be practiced enough to convince even experienced psychologists and psychiatrists, resulting in an incorrect diagnosis of below-average intellect or

malingering, instead of the correct diagnosis of mental retardation. Certain tests, when correctly administered and scored, can more effectively determine intellectually abnormal behavior. Of the tests that have been administered, only one was clearly a diagnostic test for mental disabilities. However, even if more appropriate testing instruments were used, there is simply no substitute for actual testing and teaching experience with those people who have mental retardation (see generally, Conley, Luckesson, & Bouthilet, 1992).

It is of serious concern to me that those people who have interacted with Mr. Martinez-Villareal consistently note variation in his level of functioning. Sattler (1988), in discussing testing procedures for people with mental retardation, reports that behavior during testing that is " . . . negativistic may enable the retarded . . . to maintain self-esteem in the face of difficult intellectual or social demands" (p. 95). Additionally, an examinee's persistent questioning of an examiner may "represent an effort to ensure stability" in responding, thus "fooling" the *examiner* into an incorrect judgment of heightened competence. Conversely, examiners, particularly those with little or no experience working with people who have retardation, have sometimes accused examinees of malingering or faking mental retardation. Research indicates that it is not possible for an examinee to fake mental retardation on tests of intelligence, and maintain consistent intelligence scores (Keyes, 1992). Mr. Martinez-Villareal's scores have been remarkably consistent over time. It would also appear that, while malingering has been proposed, there is no consistent evidence to back up its existence.

The statement by Mr. Marciano Munoz, M.A., that Mr. Martinez-Villareal is "rational and his thought content is logical" is highly questionable, given the content of his entry for February 27, 1997. On this date, Mr. Martinez-Villareal stated that he would "hurt himself" if he was not moved because of the pressure of being near a particular inmate whom Mr. Martinez-Villareal believed was harassing him. As stated in Mr. Munoz's record, this has happened before, and Mr. Martinez-Villareal has hurt himself before. The odd thing is that both Mr. Munoz and his supervisor, Dr. McCauley, seemed to miss a resulting pattern that is quite clear: First, Mr. Martinez-Villareal moves to a cell, begins to experience voices and harassment, complains that he must be moved or he will hurt himself, is moved to another cell – fully believing that moving to another cell block will take care of the problem, and then the voices and harassment start once again. Such thinking is neither rational or logical – but it is the sort of circular, concrete thought expected of a man with mental retardation and mental illness.

The most glaring omission in each and all of the previously performed evaluations is the complete lack of any type of adaptive behavior scale or instrument. As stated, it is impossible to determine the existence or severity of mental retardation in an examinee unless his/her adaptive behavior (or adaptive skill levels) have been investigated. Given this fact, the continuance of this case is an absolute must, if only in order to see that Mr. Martinez-Villareal's adaptive skill functioning is accurately determined so that the court can be *fully* informed as to the severity of his present mental condition.

In cases of severe or profound mental retardation, it is often impossible for the trained psychologist to perform accepted standardized assessment procedures. This is because people with such severe disabilities often lack even the basic skills for testing procedures. However, the nature of mild or educable mental retardation is sometimes so subtle that evaluators who lack experience with people who are mentally retarded may question or deny their test results. It is quite possibly for this very reason that Dr. Geffen has expressed that he is somewhat unsure of his intellectual diagnosis of Mr. Martinez-Villareal. Psychologists who make diagnoses of mentally normal or retarded based primarily upon an interview format have little understanding of the severe and sometimes beguiling nature of this disability, even in its mild form.

It is my professional opinion that evaluations previously performed represent a good investigation into the evaluation of Mr. Martinez-Villareal's current functioning. At best, however, I am unclear as to why an inventory of adaptive behavior was not performed, since it is absolutely necessary for diagnosing mental retardation. The absence of a strategy for assessing adaptive skill areas indicates the examiner(s) may not be very familiar with the definition and various behavioral aspects of mental retardation. For such an important evaluation, a psychologist with expertise in the field of mental retardation would have been far more appropriate than one lacking expertise in the field.

If you have any concerns or questions, please feel free to contact me at (803) 953-4840, or (803) 762-3681.

Sincerely,

/s/ Denis W. Keyes
Denis W. Keyes, Ph.D.
Nationally Certified School Psychologist
Diplomate of the American
Board of Forensic Examiners
Assistant Professor of Special Education
The College of Charleston/University
of Charleston, SC

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FAX (602) 379-3681

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY L. STEWART, et al., Respondents.	)	No. CIV-86-296-TUC-RMB **ORDER** (Filed May 16, 1997)

Ramon Martinez-Villareal ("Petitioner"), a death row inmate, is before the Court seeking expert services pursuant to 21 U.S.C. § 848(q) so that his competency to be executed claim can be developed and presented to the Court. His execution is set for May 21, 1997. Section 848(q) permits the Court to provide the services of experts in the preapplication phase of a habeas corpus proceeding. The State opposes the requested relief, asserting that the Petitioner's Motion for Expert Services contemplates a successive petition and, therefore, the Court lacks jurisdiction to take any action.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contains provisions curtailing the scope and availability of federal habeas corpus relief for prisoners, including those under sentence of death. In particular, the AEDPA amends the habeas corpus statutes to provide that a second petition presented to a district court must be dismissed unless it presents a claim that either 1) "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or 2) that is

based on facts that could not have been discovered earlier "through the exercise of due diligence" and if proved would "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the [the Petitioner] guilty of the underlying offense." 28 U.S.C. 2244(b)(2). Before the district court may consider a second or successive application permitted be [sic] § 2244(b)(2), the applicant must make a motion in the Court of Appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. 2244(b)(3)(A). A claim of lack of competency to be executed does not fall within either of the exceptions set forth in § 2244(b)(2).

The issue of whether the Petitioner is competent to be executed was raised before this Court in his March 25, 1993 Amended Petition. The State argued that the competency to be executed claim was not ripe for decision because the Petitioner's competency could change over time and because the Petitioner was not under a present warrant of execution. On October 21, 1994, this Court found that the Petitioner did not receive effective assistance of counsel at sentencing and remanded for resentencing. *See* Order and Memorandum Opinion of October 21, 1994. The Court also agreed with the State and found that because the Petitioner was not presently under a warrant of execution, the competency to be executed claim was premature and dismissed that claim without prejudice. *See id.* The remaining claims were denied with prejudice. *See id.* On appeal, the Ninth Circuit Court of Appeals reversed the Court's decision on the ineffective assistance of counsel claims, stating that they were procedurally barred, and affirmed in all other

respects. *See Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied* ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996). On February 28, 1997, the Court issued an amended order which comported with the mandate of the Ninth Circuit.

The AEDPA, which changed the law related to successive habeas corpus petitions, was passed after this Court's October 21, 1994 ruling on the Amended Petition. In its October 21, 1994 Order, this Court did not contemplate that deciding the issue of whether the Petitioner is competent to be executed would constitute a successive petition. In fact, the Court's Order denying the Petitioner's Motion for Reconsideration specifically recognized that the issue would not be treated as a successive petition. *See* Order of March 25, 1997.

After a review of the pleadings and oral argument, this Court concludes that, as result of the AEDPA, it does not have jurisdiction to entertain the relief sought by the Petitioner. *See In re Medina*, 109 F.3d 1556 (11th Cir. 1997); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997). Congress may constitutionally limit the jurisdiction of the courts. *Landgraf v. USI Film Products*, 511 U.S. 244, 273, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229 (1994). The Court agrees with the Petitioner that the AEDPA effectively deprives all federal district courts of jurisdiction to entertain second petitions raising Eighth Amendment "competency to be executed" claims. However, this does not mean that the Petitioner has forfeited his legal remedies. First, the Petitioner may apply for certiorari review of the state court competency proceedings with the United States Supreme Court. The Petitioner may also file an original habeas application to the United States Supreme

Court. *See Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2338-39, 135 L.Ed.2d 827 (1996) (the provisions of section 2244(b), as amended, do not restrict the Supreme Court's original habeas authority). Finally, the Petitioner may apply to the Court of Appeals for permission to proceed in the district court. Thus, although the Petitioner cannot bring his Eighth Amendment competency to be executed claim in this Court at this time, he is not precluded from federal review of this claim.

Although this Court may not review the Petitioner's competency to be executed at this time, the Court recalls that it had the opportunity to observe the the [sic] Petitioner in 1994. This Court can only state that its observations of the Petitioner in 1994 called into serious doubt the Petitioner's competence. At the three-day evidentiary hearing before this Court on the Petitioner's original amended petition, the State psychiatrist testified that if the Petitioner was presently incompetent, it was because he was not receiving the correct medication. The Court then asked the psychiatrist if that meant that the State could medicate in order to eradicate. The expert answered "yes." The report of Dr. Jonathan Pincus, dated April 1, 1997, states that the Petitioner has not been receiving medication. *See* Exhibit C to Motion for Expert Services. This fact alone raises serious concerns in the mind of this Court as to whether the Petitioner is presently capable of understanding 1) that he is to be punished by execution, and 2) why he is being punished. Without more guidance from the Ninth Circuit or the United States Supreme Court, this Court concludes that it lacks jurisdiction to review the state court proceedings

below to ensure that the Petitioner is receiving his medication and, therefore, is competent to be executed.

Dated this 16th day of May, 1997.

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY L. STEWART, et al., Respondents.	)	No. CIV-86-296-TUC-RMB **ORDER** (Filed May 16, 1997)

On April 24, 1996, the "Antiterrorism and Effective Death Penalty Act of 1996" (the "Act") was signed into law, amending 28 U.S.C. § 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848(q). Rule 22(b) of the Federal Rules of Appellate Procedure, as amended, provides that if an appeal is taken by a petitioner, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. Section 2253 of Title 28, United States Code, as amended, provides that a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In the certificate, the court must indicate which specific issues satisfy this showing. 28 U.S.C. § 2253(c)(3).

Concurrently with this Order, the Court issued an Order denying Petitioner's Motion for Expert Services ("Motion"). This Court concluded that, without more guidance from the Court of Appeals or the United States Supreme Court, it lacked jurisdiction. The Court is satisfied that, through his incompetence to be executed claim,

the Petitioner has made a substantial showing of the denial of a constitutional right.

Dated this 16th day of May, 1997.

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States District Judge

CAPITAL CASE: EXECUTION SCHEDULED FOR 12:05 A.M. MAY 21, 1997

No. 97-80229

IN THE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
TERRY STEWART, et al.,
Respondents/Appellees.

No. 94-99011, 94-99012

IN THE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
SAMUEL LEWIS, et al.,
Respondents/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MOTION FOR CERTIFICATE OF PROBABLE CAUSE; MOTION FOR REMAND TO FILE FED.R.CIV. P 60(B) MOTION; MOTION FOR LEAVE TO FILE SUCCESSOR PETITION; MOTION TO RECALL THE MANDATE AND MOTION FOR STAY OF EXECUTION

INTRODUCTION

This case has previously been before this Court. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir. 1996). In disposing of it, however, this Court reserved judgment on one issue: whether Mr. Martinez-Villareal was competent to be executed. *Id.* at 1309, n.1. It did so on the ground, urged by Respondents, who had earlier persuaded the District Court of the same thing, Order and Memorandum Opinion, Oct. 21, 1994 [Doc. No. 136], at 19, that this claim was "premature." On remand, the District Court entered an order dismissing the petition "without prejudice" so that this claim could be timely brought. Petitioner moved for reconsideration under Fed.R.Civ.P. 59, pointing out to the court that it could lose jurisdiction to consider the reserved issue because of the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Respondents did not respond to the motion. The District Court denied the Rule 59 motion, stating clearly its belief that it could still consider the issue, and specifically stating that the claim would not be "treat[ed]" as "successive." Order, Mar. 24, 1997. Respondents remained silent, filing nothing to inform the court it

disagreed with this position. To preserve jurisdiction, Petitioner filed notice of this appeal.

During this same time, Respondents sought and obtained a warrant of execution. Proceedings were then held in the Arizona state court regarding Petitioner's competency. After denying Petitioner's requests for expert assistance and testing, the state court ruled that Petitioner was competent, although it did not resolve the disputed facts, except to note that there is credible evidence on both sides. While the statutory review to the Arizona Supreme Court is pending, Petitioner filed a request for appointment of counsel and expert assistance or access with the District Court. In response, Respondents argued for the first time that the District Court had lost all jurisdiction under the AEDPA. At oral argument, the District Court said that, although it had grave reservations about Petitioner's competency (based on its previous observations) and thus believed the claim had merit, it believed it had lost jurisdiction over the case due to the dismissal of this petition and the passage of the AEDPA.

Petitioner is thus caught in a Catch 22, an unparalleled inequity: He has a substantial claim his execution would be unconstitutional. The District Court and this Court previously refused to address this saying it was premature. The District Court then dismissed the petition in the belief it could reconsider this claim later. Respondents sat back silently and permitted this without registering disagreement or indicating they had changed their previous position that the case could be brought back. Now Respondents have asserted that federal jurisdiction

to consider this erious [sic] constitutional claim has been lost, as an unintended result of the District Court's action.

MOTIONS

Petitioner has brought this appeal, and makes the following motions, to correct this pending injustice:

1. In *Martinez-Villareal v. Stewart*, No. 97-99009, Petitioner moves for the following relief:

(a) A certificate of probable cause permittig [sic] him to appeal from the District Court's order dismissng this petition "without prejudice," and its denial of the motion for reconsideration of that order;

(b) Alternatively, leave to file a motion for relief from the judgment under Fed.R.Civ.P. 60(b);

(c) Alternatively, leave to file a successor petition ini [sic] the District Court upon exhaustion of state remedies.

2. In *Martinez-Villareal v. Lewis*, No. 94-99011 and 94-99012, Peittioner [sic] moves the Court to recall its mandate and amend its decisioni [sic] to retain federal jurisdiciton [sic] overy [sic] his present competency claim.

3. In both causes, Petitioner moves for a stay of his execution pending a resolutioin [sic] of all federal proceedings with regard to Petitioner's competency to be executed.

Petitioner also moves this Court for a stay of execution pending further proceedings in this Court or before the District Court.

FACTS

The facts supporting these requests are:

1. Petitioner is mentally retarded with an I.Q. of 64 and mentally ill, and he is unaware of his pending execution and the reasons for it. In 1993, in his first appearance before the District Court, Mr. Martinez-Villareal, through counsel, alleged that he "did not and does not have the mental capacity to appreciate the nature of his sentence." Amended Petition for Writ of Habeas Corpus ("Habeas Petition"), filed Mar. 26, 1993 at ¶ 4.16.[1] Since Mr. Martinez-Villareal did not and does not have the mental capacity to appreciate the nature of his sentence, under *Ford v. Wainwright*, 477 U.S. 399 (1986), his rights under the Eighth and Fourteenth Amendment would be violated if he is executed. *Id.* at ¶ 106.

2. In the 1993 District Court proceedings, Respondents, however, persuaded the District Court that it did not have jurisdiction to hear the claim because it was "not now ripe for determination" and should be brought when an execution "warrant has been issued." They said:

> [T]his issue is not ripe for decision, because no execution can take place without the issuance of a warrant of execution, no such warrant presently exists, and the Arizona Supreme Court apparently is not issuing such warrants concerning defendants who are protected (as is Petitioner) by a federal stay of execution."

[1] The then-known facts supporting the claim were outlined in ¶¶ 25 through 90 of the habeas petition.

Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45-46 (Dec. 17, 1993). Describing Petitioner's desire to have the claim decided at that time as "unworkable," Respondents stated that it was important to:

> have a single adjudication of competency, *At a time when all [petitioner's] other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.*

Id. (emphasis added).

3. The District Court adopted Respondents' position:

> At present, there is no execution warrant outstanding as to Martinez-Villareal since this Court issued its stay. Thus, Martinez-Villareal is not facing execution nor with appellate review will he face likely execution in the near future. *This claim is premature and denied without prejudice.*

Order and Memorandum Opinion, Oct. 21, 1994, at 19 (emphasis added).

4. The District Court did issue the writ of habeas corpus as to Mr. Martinez-Villareal's death sentence after concluding that he did not receive the effective assistance of counsel. Order and Memorandum Opinion, Oct. 21, 1994, at 30.

5. On appeal, this Court found that the writ was improperly granted because Mr. Martinez-Villareal's

claim of ineffective assistance of counsel was procedurally barred. *Martinez-Villareal v. Lewis*, 80 F.3d at 1305. This Court explicitly stated, however, "[t]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. *Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question.*" *Id.* at 1309, n.1 (emphasis added).

6. On remand to the District Court, the District Court entered an order again denying, "without prejudice," Mr. Martinez-Villareal's competency challenge. Order and Entry, Feb. 28, 01997 [sic]. [Doc. Nos. 152 and 153]. Petitioner, however, moved to amend the judgment pursuant to Fed.Civ.P. Rule 59 "direct[ing] the Court's attention" to the AEDPA [the amendments to the federal habeas corpus statutes encted [sic] in 1996] and quoted 28 U.S.C. § 2244(b)(1), (b)(3)(A) and § 2255. Petitioner summarized the possible effect of these new enactments, noting:

> In other words, petitioner's claim to incompetence to be executed would be barred notwithstanding this Court's dismissal "without prejudice." This would contravene the clear intention of the parties, violate due process under the Fifth and Fourteenth Amendments, and constitute an unconstitutional suspension of the writ of habeas corpus in violation of Art. I, Sec. 9 of the Constitution.

Martinez-Villareal v. Stewart, No. CIV 86-296-TUC-RMB, Motion to Reconsider Order and Judgment (Mar. 11, 1997). Petitioner urged the District Court "[i]n the interests of fairness," "in an abundance of caution," and to prevent "a cruel injustice" that would result if "petitioner's challenge was barred as a successive claim," to reconsider the order dismissing this claim, and hold "the issue in abeyance pending the outcome of the current proceedings" ongoing in state court. *Id.* at 2. Respondents did not respond.

7. The District Court denied Petitioner's motion, stating that the reason the competency to be executed claim was dismissed was because "it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice." Noting that Petitioner "warn[ed] the Court that the premature claim could be precluded as a successive claim" by the AEDPA, the Court stated that it "has no intention of treating the 'incompetency to be executed' claim as a successive petition." Order, Mar. 24, 1997 [Doc. No. 155], at 1. Again, Respondents said nothing before or after this order was issued.

8. On April 17, 1997, Petitioner filed this appeal to preserve federal jurisdiction. The District Court denied a "certificate of appealability." *Martinez-Villareal v. Stewart*, No. CIV 86-296 TUC RMB, Order (May 8, 1997).[2] The appeal from the District Court's Order denying the Rule 59 motion is presently before this Court.

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[2] This order was mistakenly based on the provisions of the AEDPA governing certififdates [sic] of appealability, although those provisions are inapplicable to cases, like this one, filed prior to the effective date of those statutory amendments. *See Naddi v. Hill*, 106 F.3d 275, 276 (9th Cir. 1997).

9. On April 15, 1997, the Arizona Supreme Court issued a second execution warrant setting Mr. Martinez-Villareal's execution for 12:05 a.m. on Wednesday, May 21, 1997. *State v. Martinez-Villareal*, No. CR-83-0207 AP (Ariz. Apr. 15, 1997). A hearing was held in the Pinal County Superior Court on April 6, May 6, 7 and 8, 1997, to determine whether Mr. Martinez-Villareal was competent to be executed. At the state court hearing, substantial evidence and testimony established that Mr. Martinez-Villareal continues to experience symptoms of a major psychotic disorder, which was traced back to his childhood, and that his condition is compounded by mental retardation and brain damage. The state claimed that Mr. Martinez-Villareal is malingering all of these conditions.

10. Prior to and during the hearing, counsel for Mr. Martinez-Villareal asked the Arizona state court for leave to conduct a MRI scan and neurometric EEG of Mr. Martinez-Villareal and for an expert specializing in the field of mental retardation to examine Mr. Martinez-Villareal. Counsel explained that the accusation that Mr. Martinez-Villareal was malingering his condition, and that he made statements reflecting an awareness of his crime and punishment, increased the need for a reliable determination of the issues of brain damage and mental retardation. All of the requests were denied by the state court and the hearing went forward without Petitioner having an opportunity to present such evidence.

11. A day after the conclusion of the evidence the state court determined, *inter alia*, that:

> Credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer form [sic] a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestations of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by the law. . . .

State v. Martinez-Villareal, No. CR-97022291, Minute Entry (May 9, 1997). The state court then summarily concluded Mr. Martinez-Villareal failed to prove that he was not competent to be executed, and thus he was aware that he is to be punished for the crime of murder and that the punishment for that crime is death. *Id.*

12. The next court day, Monday, May 12, 1997, Mr. Martinez-Villareal filed a special action with the Arizona Supreme Court, as required under A.R.S. § 13-4022(G), to review the lower court's order, and a motion to stay his execution. On Tuesday, May 13, 1997, the Arizona Supreme Court issued an order stating that it "will try to resolve the issues" by May 16 or May 19, 1997. *Martinez-Villareal v. Pinal County Superior Court, et al.*, No. CV-97-0206-SA (May 13, 1997).

13. On May 13, 1997, Mr. Martinez-Villareal moved the District Court for appointment of counsel and expert assistance or access to him so that his competency to be executed claim could be fully developed and presented in the District Court in his supplemental petition. *Martinez-*

Villareal v. Stewart, No. CIV-86-296 TUC RMB, Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 13, 1997).[3] On May 14, 1997, the District Court issued an order appointing counsel and scheduling a conference regarding the motion for expert services or access on May 15, 1997, at 2:30 p.m.

14. On May 15, 1997, Respondents responded to the request for appointment of counsel and expert services or access *and for the first time*, claimed that the District Court *"lacks jurisdiction to take any action"* because the claim is "successive." *Martinez-Villareal v. Stewart*, No. CIV-86-296 TUC RMB, Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997) at 1 (emphasis in original). Respondents contended that under newly amended 28 U.S.C. § 2244(b), Petitioner's claim "simply cannot be entertained in a successive petition." *Id.* at 2.

15. Petitioner filed a reply, asking the District Court to find Respondents judicially estopped from this about-face because Mr. Martinez-Villareal had in good faith relied on Respondents' assurances that this claim would be considered by the District Court at the right time.

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[3] Petitioner had earlier sought appointment of counsel which had been denied by the District Court. In response to that motion, Respondents never mentioned its belief that the District Court had no authority to consider the supplemented *Ford* claim. Instead Respondents took no position on appointment of counsel and merely asked the District Court "in the interests of clarity" to assign "an appropriate new cause number to be used in these proceedings so that there would be "some means of referring to such new activity." *Martinez-Villareal v. Stewart*, No. CIV 86-296-TUC-RMB (Mar. 28, 1997).

Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Reply to Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997).

16. At the hearing, the District Court, Judge Richard Bilby, expressed serious concerns that he had no jurisdiction to consider the claim based on Respondents' argument that the AEDPA withdrew his jurisdiction. Judge Bilby stated that he believed Mr. Martinez-Villareal was severely ill and mentally retarded and was not malingering. He also said he had grave concerns about his competency. He said he based these conclusions, in part, on his own observations.[4] As a result, although Judge Bilby said he wanted to hear this claim, he believed he had no jurisdiction to do so.[5]

ARGUMENT

I. A Certificate of Probable Cause Should Issue.

Petitioner moves this Court[6] pursuant to 28 U.S.C. § 2253, for a certificate of probable cause permitting him

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[4] In 1994, the District Court held a hearing on Petitioner's presence [sic] competency. The District Court never resolved that issue, ultimately deciding it was premature, and granting Petitioner relief on his claim of ineffective assistance of counsel at sentencing.

[5] In an order just received from the Disttrict [sic] court, Judge Bilby states that he has "serious concerns in the mind of this Court as to whether the Petitioner is presently capable of understanding" that he is to be executed and why he is being punished. Exhibit A.

[6] The District Court just issued today a certificate of probabble [sic] cause from an order it issued today on a related

to appeal the Court's order dismissing the petition and denying reconsideration of the order of dismissal.[7] A certificate should issue if the issues raised are " 'debatable among jurists of reason' " and ones which "a court could resolve in a different manner." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). There is no question that this appeal presents debatable issues.

The District Court's order of dismissal "without prejudice" and its decision denying reconsideration of that order, were – according to the Respondents themselves – based on a legal misconception: a belief that the District Court would not be required to "treat[] the 'incompetency to be executed' claim as a successive petition." Order Denying Reconsideration at 1. If Respondents are correct, and the AEDPA bars the District Court from considering any further petitions in this matter, now that this one has been dismissed, the District Court's denial of reconsideration was based on an error of law, and was therefore an abuse of discretion. See *Del Monte Dunes v. Monterey*, 95 F.3d 1422, 1426 (9th Cir. 1995); *Flores v. Shakala*, 49 F.3d 562, 567 (9th Cir. 1995); *Maulding v. United States*, 257 F.2d 36 (9th Cir. 1958) (denial of new trial reviewed for abuse of discretion or error of law). Respondents' own newly-adopted position that the District Court was wrong in its belief that it could consider the

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matter: Petitioner's request for expert assistance and access to him. See Exhibit B.

[7] Because this case is governed by prior law and not by the recently enacted 1996 Habeas Corpus Amendments, a certificate of probable [sic] is the necessary and appropriate authorization for appeal. See *Haddi v. Hill*, 106 F.3d 275, 276 (9th Cir. 1997); *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996).

"incompetency to be executed" claim after dismissal of this petition, alone establishes there is probable cause for this appeal.

Even if Respondents are not correct, substantial and debatable issues are clearly presented here. Respondents' changed positions and deceptive conduct raise a serious issue as to whether they should be estopped from raising any procedural objection to the federal review of Petitioner's competency claim. *See Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2915 (1991). In addition, the District Court's order, if interpreted to bar federal consideration of Petitioner's previously asserted cliam [sic], could constitute a denial of due process and a suspension of the writ of habeas corpus, sufficiently serious to require an exception to the procedural bars the AEDPA could otherwise impose. *Cf. Burris v. Park*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc) (exception to 7th Circuit's determination that the AEDPA is retroactive required in similar circumstances).

These issues are novel and difficult. Whatever their correct disposition may be, however it is plainly not the one the District Court gave in dismissing the petition below and denying reconsideration of that dismissal. Even the Respondents assert that. A certificate of probable cause to review the District Court's order should therefore be issued.

II. Leave Should Be Granted To Allow Petitioner to File A Rule 60(b) Motion.

Alternatively, this Court should grant Petitioner leave to file a Rule 60(b) motion in the District Court.

Carriger v. Lewis, 971 F.2d 329, 331 (9th Cir. 1992). Based on the conference that took place May 15, there is little doubt that the District Court is willing to entertain such a motion.

Although ordinarily a petitioner would face problems regarding the rules concerning successive petitions when attempting to file a Rule 60(b) motion, under these unprecedented circumstances, a Rule 60(b) motion is proper. As discussed above, the District Court was clearly operating under a misunderstanding of the law when it dismissed the petition believing it could entertain the competency claim without a successor bar.

Relief under Rule 60(b)(6) is available just for such extraordinary circumstances as these. Rule 60(b)(6) "reflects and confirms the courts' own inherent and discretionary power 'firmly established in English practice long before foundation of our Republic.' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1460 (1995), citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). There is no question but that these facts work an extreme inequity.

Rule 60(b)(3) relief which allows relief based on fraud, misrepresentation or other misconduct of an adverse party, is also warranted under these facts based on Respondents' actions. As discussed above, Respondents first persuaded the District Court that it could hear this claim under the very circumstances present here. Relying on that position, the District Court dismissed the claim "without prejudice" because it was premature. Respondents then requested, and obtained, a warrant for

Petitioner's execution. Petitioner moved the District Court to amend its order dismissing the petition and hold this claim in abeyance. Petitioner specifically referred the District Court to the passage of the AEDPA and its potential consequences. Respondents remained mute during these proceedings. The District Court issued an order denying Petitioner's request but stating that it intended to hear the claim, and it would not be treated as a successive claim. Respondents remained mute. It was only two days ago as Petitioner sought services to bring this supplemented claim fully and fairly before the District Court, that Respondents spoke up, and asserted an entirely new position: they now contended the competency claim was barred, and the District Court could not hear it, and, indeed, no federal court could hear it.

On these facts, Respondents misrepresented the consequences stemming from the District Court's actions not only to Petitioner, but to the District Court as well. Not once did Respondents tell the District Court that it was entirely wrong, as a matter of law, in its belief that it could hear this claim.

Respondents should also be judicially estopped from taking this entirely inconsistent position. As this Court has explained,

> the doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.

Russell v. Rolfs, 893 F.2d at 1037. The doctrine is "intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose' with the courts." *Helfand v. Gerson*, 105 F.3d 530, 533 (9th Cir. 1997) (quoting *Russell v. Rolfs*, 893 F.2d at 1037). In *Russell*, judicial estoppel was applied to prevent the state from taking a directly contrary position under circumstances strikingly similar to those presented here. There, the state "persuaded the district court to deny [the habeas corpus petitioner] federal review on the ground that he had an 'adequate and available' state remedy" to exhaust his claim. *Id.*, at 1038. However, once the petitioner returned to state court, the state "disregarded its previous representation in federal court and argued the petition was procedurally barred because [the petitioner] had raised the same issues on direct appeal." The state court ultimately agreed, and found the claim procedurally defaulted. However, when the petitioner returned to federal court, the state argued that the petitioner "was procedurally barred from presenting his claim in federal court." *Id.* at 1037. The appellate court held that the state's earlier action estopped it from taking this entirely different position. *See Yniguez v. State of Arizona*, 939 F.2d 727 (1991) (Attorney General judicially estopped from "about-face" where he sought "an outcome [in the appellate court that was] directly contrary to the result he sought and obtained in the district court").

In another analogous situation, although the inequities presented here are far greater, the Seventh Circuit, which applies the AEDPA retroactively to pending cases, concluded that the AEDPA could not be applied to a

second petition challenging the constitutionality of a petitioner's death sentence for the first time. *Burris v. Parke*, 95 F.3d at 469. The en banc court reached this ruling based on the fact that at the time the first habeas petition was filed, all the parties, including the state, believed the petitioner could later file a second petition challenging his sentencing issues after exhausting his state court remedies. The en banc court noted that the hearing transcript on the first petition gave "no hint" that proceeding this way "might have precluded [Burris from] filing a second petition limited to the sentence, and in fact the "silences are deafening." Under these circumstances, the court concluded that:

> the state's silence concerning the implications of an immediate decision on the petition was tantamount to a statement that for the sake of a prompt decision on the merits of Burris's challenge to his conviction the state would forgo the defense of abuse of the writ should he file a subsequent petition limited to the sentence.

Id., at 470. As a result, the "state forfeited any defense" preventing the claims to be heard on the merits in the second petition because applying the AEDPA "would have the effect of mousetrapping [the petitioner]. It would cause him to forfeit a legal remedy on which his life may, literally, depend."

The en banc court also found it "of no moment" that the petitioner had filed a second petition before the AEDPA went into effect. The only thing that was important was that application of the AEDPA would "attach a new, unforeseeable, and adverse legal consequence to the first petition." *Id.*

Here, of course, Petitioner has not filed a second petition. This is his first petition. Petitioner should at the very least be given the same relief as that given in *Burris*, particularly given that Respondents were not just silent; they actively advocated to both the Court and Petitioner that this claim should not be heard earlier. Petitioner then did just what Respondents, and the District Court, told him to do: he reasserted this claim after a warrant of execution issued. Yet now he is faced with no remedy at all. Respondents must be estopped from obtaining this result.

III. Petitioner Should Be Granted Leave To File A Successive Petition.

Alternatively, because of the unprecedented circumstances here, Petitioner requests leave to file a new petition in the District Court, pursuant to 28 U.S.C. § 2244, before it was amended by the AEDPA. This result is consistent with that reached in *Burris v. Park* where similar, although not nearly as harsh, circumstances were present. If Petitioner were not allowed to file a successive petition, and Respondents' argument allowed to prevail, then the AEDPA effectively deprives all federal district courts of jurisdiction to enforce the Eighth Amendment prohibition on the execution of the insane. Nothing in the legislative history or text of the statute indicates an intent to divest the federal courts of jurisdiction to enforce any right recognized under the federal constitution.

The constitutional nature of the right in issue in this case is not open to question. The Supreme Court has definitively ruled that the Eighth Amendment "prohibits

a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. at 409-410. Since *Marbury v. Madison*, 1 Cranch 37, 2 L.Ed. 60 (1803), the power and duty of the federal courts to enforce the constitution has been beyond dispute. Though some restrictions were placed upon the writ of habeas corpus in the recent legislation, Congress continued to respect the role of federal courts to interpret the Constitution:

> In the great 1803 case of Marbury v. Madison, Chief Justice John Marshall explained for the Supreme Court that "it is emphatically the province and duty of the judicial department to say what the law is." Section 104(3) would be subject to serious constitutional challenge if it were read to preclude the Federal Courts from making an independent determination of "what the law is" in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section 104 to permit independent Federal Court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal Laws.

Statement by President William Jefferson Clinton upon signing S. 1965, April 24, 1996, 1996 WL 517206.

Respondents seek to limit the power of the federal courts by procedural artifice – first by defending the issue in prior proceedings on the ground that it should be raised now, and now claiming that it should have been ruled upon then. This Court should do as the Seventh Circuit did: flatly reject such an argument. *Burris v. Parks*,

95 F.3d at 469. To do otherwise here raises a novel and serious constitutional question: whether it would violate the Suspension Clause of Article 1, Section 9 to deprive Petitioner completely of the right to be protected from execution while he is incompetent – even though he raised this claim in his petition four yeas ago and it was dismissed without prejudice as premature. Under these facts, "the Privilege of the Writ of Habeas Corpus" with regard to his fundamental constitutional right not to be executed while insane, would be "suspended" completely. An application of the AEDPA which so abruptly and drastically eliminates an existing vested right to apply for relief raises serious questions under the Suspension Clause. *Cf. Breard v. Angelone,* 926 F.Supp. 546, 5474 (E.D.Va. 1996) (interpreting limitations period of 28 U.S.C. § 2263 to commence on date of AEDPA's passage where, to do otherwise would have immediately time barred petitioner's claim, to avoid violation of the Suspension Clause).

In the extraordinary circumstances of this case, if the Court can find no other means by which to fulfill the promise that Petitioner would be allowed to litigate his 'present competence' claim at a later date, the Court should grant relief similar to that allowed by the Seventh Circuit in *Burris:* leave to file a successive petition unimpeded by the newly created restrictions of the AEDPA. If no other remedy exists, only by such an order can this case be resolved in a manner consistent with the constitutional guarantees surrounding the writ of habeas corpus, and the due process of law to which Petitioner is entitled under the Fifth and Fourteenth Amendments.

IV. This Court Should Recall Its Mandate To Hear This Claim.

This Court has the power to recall a mandate because of "an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice." *Ziptel v. Halliburton Company,* 861 F.2d 565, 567-68 (9th Cir. 1988). Exceptional circumstances require recalling the mandate when necessary "to protect the integrity of [the court's] own processes." *Bryant v. Ford Motor Co.,* 886 F.2d 1526, 1529 (9th Cir. 1989). An "abrupt change in the law" also justifies a recall of the mandate. *Id.* at 1530. This Court found such a reason in *Bryant* where congressional action was taken while the appellee's petition for certiorari was pending in that case which "conceivably deprived [appellee] of its day in court before the Supreme Court." *Id.*

Here, too, an abrupt change in the law in the middle of these proceedings requires this Court to take extraordinary action to prevent a manifest injustice. At the time the District Court originally reserved decision on the present competency issue, and this Court affirmed that reservation, it believed, as did Petitioner and the Respondents, that this claim could be heard when a warrant for execution issued. As a result of this belief, there was no federal determination of Petitioner's competency. In the interim, however, the AEDPA was enacted which bars federal review of any claims raised in successive habeas petitions concerning the legality of a sentence. Moreover, completely contrary to their earlier position, Respondents have just for the first time contended that this claim cannot be heard, but is barred under the recently enacted

AEDPA provisions. Because Petitioner relied to his detriment on express and repeated assurances that his competency to be executed would be reviewed, and no procedural bar to that review would be raised, "good cause" exists to recali the mandate of the prior judgment to prevent this injustice. *See Aerojet-General Corp. v. American Arbitration Association*, 478 F.2d 248, 254 (9th Cir. 1973).

V. A Stay Of Execution Is Necessary and Warranted.

Petitioner moves this Court to stay his execution to properly and thoroughly consider and resolve a number of serious issues arising out of the Catch 22 Respondents, and, albeit unwittingly, the District Court, created when it dismissed this petition. A gross miscarriage of justice will occur if a stay does not issue in light of these extraordinary circumstances that bring this case to this Court at this time. All of these questions raised here present novel and important constitutional question warranting this Court's full review. This review, however, cannot take place in the short time remaining before Petitioner's execution. For all these reasons, Petitioner asks this Court to immediately issue a stay of his execution.

Dated this 16th day of May, 1997.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 97-80229
(Former Nos. 94-99011, 94-99012)

RAMON MARTINEZ-VILLAREAL, PETITIONER-APPELLANT, -vs- TERRY L. STEWART, et al., RESPONDENTS-APPELLEES.	)	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-86-296 TUC RMB

OPPOSITION TO MOTION FOR MISCELLANEOUS RELIEF
(Certificate of Probable Cause; Remand to File Rule 60(b) Motion; Leave to File Successor Petition; Recall of Mandate; Stay of Execution)

CAPITAL CASE: EXECUTION SHEDULED [sic] FOR MAY 21, 1997

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 97-99009
(Former Nos. 94-99011, 94-0012)

RAMON MARTINEZ-VILLAREAL, PETITIONER-APPELLANT, -vs- TERRY L. STEWART, et al., RESPONDENTS-APPELLEES.	)	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-86-296 TUC RMB CAPITAL CASE: EXECUTION SCHEDULED FOR MAY 21, 1997

Respondents oppose all relief requested by Petitioner, for the reasons set out in the attached Memorandum of Points and Authorities.

DATED this 19th day of May, 1997.

Respectfully submitted,

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Attorney General
/s/ BRUCE M. FERG
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Assistant Attorney General

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RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural History.

Petitioner was convicted of two counts of murder and sentenced to death. *State v. Martinez-Villareal*, 145 Ariz. 411, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985). After three state post-conviction ("Rule 32") proceedings, he filed a federal habeas corpus petition. The District Court granted the petition in part, ordering that he be resentenced, on the ground that trial counsel had been ineffective in the penalty phase of the trial. However, this Court reversed that grant of relief because the ineffective assistance claim was procedurally barred, and found no other grounds on which to grant relief. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). In the District Court Petitioner had asserted that he was incompetent to be executed, but "Because the trial court held that under Arizona law a Rule 32 petition is not the correct procedure for pursuing such a claim, the district court properly found this claim to be premature." (*Id.* at 1307.) This Court noted that its ultimate "instruction to enter judgment denying the petition is not intended to affect any later litigation of that [current incompetency] question." (*Id.* at 1309 n.1.)

In accordance with this Court's directions, the District Court entered judgment, denying the competency for execution claim without prejudice and the rest of the petition with prejudice. (CR 152-53, Order and Judgment of Feb. 28, 1997.)[1] Petitioner's counsel, Sean Bruner, filed a motion for reconsideration under Rule 59 of the Federal Rules of Civil Procedure, requesting that the competency for execution claim be held in abeyance, rather than dismissed, in order to avoid application of the limitation on successive petitions enacted by the 1996 Antiterrorism and Effective Death Penalty Act. (CR 154.) The District Court denied that motion, because in its view there was no need to grant the requested relief:

> That particular claim could not even be construed as an unexhausted claim since it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the "incompetency to be executed" claim as a successive petition.

(CR 155.) Petitioner filed a notice of appeal from the denial of the Rule 59 motion. (CR 159.) The District Court refused to issue a certificate of appealability, stating:

> Petitioner is attempting to have this Court issue a stay where there are no outstanding matters pending. Petitioner must exhaust his state claim on the status of his present mental competency. Moreover, Petitioner provided no authority [for]

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[1] Unless otherwise indicated, all documents referred to herein are already available to the Court, in the record related to Petitioner's appeal, transmitted to this Court on 5/8/97, or previously lodged with this Court by Respondents.

> his request for stay of the Petition. The Court concludes that this appeal is legally deficient and procedurally improper.

(CR 162.) On May 16, 1997, this Court agreed with that decision, itself denying a COA on the Rule 59 appeal.

In March of 1997 Petitioner also filed motions with the District Court seeking the appointment of another individual attorney, Sean O'Brien, and the Federal Public Defender's Office, to assist Bruner in the federal habeas proceeding. (CR 156, 160.) The District Court denied both motions, noting that it lacked jurisdiction to make the appointments, because the case had been "termed" by its actions of February 28, 1997. (CR 161.)

In February of 1997 Mr. Bruner filed an appropriate motion in the Arizona Superior Court, requesting an evaluation of Petitioner's competency to be executed, in accordance with A.R.S. § 13-4022. As preparations for a hearing on that issue were being made, the Arizona Supreme Court issued a warrant, setting Petitioner's execution date for April 16, 1997. The Superior Court commenced the evidentiary hearing on April 7, 1997 but did not complete it at that time. Mr. Bruner had taken a special action to the Arizona Supreme Court, complaining that he had inadequate time to prepare, so the Arizona Supreme Court stayed the execution, resetting it for May 21, 1997. Additional evidence was taken by the Superior Court on May 6-8, 1997. It issued its ruling on May 9, 1997, finding Petitioner competent to be executed, because he "is aware that he is to be punished for the crime of murder and . . . he is aware that the impending punishment for that crime is death." As permitted by the

statute, Petitioner then filed a special action to the Arizona Supreme Court, seeking review of that determination and legal issues related to it, which Respondents have answered. The Arizona Supreme Court concluded its review late on Friday, May 16, stating: "[H]aving independently reviewed the testimony and medical evidence introduced at the hearing, and in light of the findings of the trial court, this court concludes that the trial judge correctly found that Petitioner failed to prove incompetency by clear and convincing evidence or even by the lesser standard requiring proof by a preponderance of the evidence."

On May 13, 1997, the Arizona Federal Public Defender Office filed a motion in the District Court, requesting that they and Sean O'Brien be appointed to represent Petitioner, on the theory that original counsel Sean Bruner might need "to be called as a witness at a competency hearing in this [District] Court." (Page 8.) They further requested authorization to expend funds for MRI and special EEG testing of Petitioner, as well as to retain additional mental health experts to evaluate Petitioner, because those requests had been denied in the Superior Court proceeding. (*Id.* at 3-9.) Without waiting for a response from Respondents, the District Court issued an order on May 14, 1997, granting the appointment of the FPD and O'Brien as counsel, and setting a telephonic hearing on the remainder of the requests for the afternoon of May 15. On the morning of May 15, Respondents filed a detailed opposition to the motion, pointing out the successive nature of the petition being contemplated, the lack of permission for filing from this Court, and other reasons why the District Court lacked

jurisdiction to take any action in the case. A telephonic hearing was held on the afternoon of May 15, and on May 16 the District Court issued two orders, concluding that it lacks jurisdiction, but granting a certificate of appeal.

B. Factual Representations In Petitioner's Motion.

A number of statements made in the Motion may be seriously misleading to the Court, and so will be addressed immediately.

1. The Motion at 2 characterizes this Court's action in the original appeal as "reserv[ing] judgment" on the competency for execution issue, as if this Court contemplated some kind of continuing jurisdiction over that claim. However, the very footnote from the opinion which it cites plainly (and correctly) states that that claim had been denied by the District Court as premature and, "That decision was not contested on appeal." 80 F.2d at 1309 n.1. Not having been contested on appeal, the ruling on the competency issue was not before the Court, so there was neither the jurisdiction nor the intention on the part of this Court to have any continuing oversight concerning it.

2. Throughout the Motion counsel for Respondents is characterized as deceptive, playing fast and loose with the courts, and the like, largely because no response was filed to the Rule 59 motion. Petitioner conveniently ignores Arizona District Court Rule 1.10(p): "No response to a motion for reconsideration or clarification shall be filed unless ordered by the Court. If the Court is inclined to grant a motion for reconsideration, or otherwise desires a response before ruling, it shall order opposing

counsel to respond." The District Court ruled on the Rule 59 motion without ordering any response from Respondents; counsel for Respondents cannot reasonably be faulted for "remaining mute" and not filing something when the rule specifically forbade him to do so.

Moreover, it must be recognized that the only authority directly addressing whether a competency for execution claim will be deemed successive under the amended habeas corpus statutes is *In re Medina*, 109 F.3d 1556 (11th Cir.), *cert. denied*, 117 S. Ct. 1330, 1331 (1997). That decision was published on March 24, 1997 – the very day the District Court ruled on the Rule 59 motion. Counsel for Respondents did not, to the best of his recollection, become aware of *In re Medina* until weeks later, after Petitioner's notice of appeal had been filed on April 17, and while he was focused on preparations for the continued evidentiary hearing to be held in the Superior Court. The District Court lost jurisdiction of the Rule 59 matter as soon as the notice of appeal was filed. *Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992). Thus, there was neither opportunity nor reason to point out *In re Medina* to the District Court until the Federal Public Defenders filed their May 13 motions.

The second major basis for calling Respondents' counsel names is that he suggested to the District Court that the "competency for execution" claim was unripe for federal adjudication in 1994. How it could have been more accurately described is a puzzlement: at the time it had not been properly presented to the state courts (see this Court's previous opinion, 80 F.3d at 1307); no warrant had then been issued, and none would be issued under the Arizona Supreme Court's practice until the

federal habeas proceeding was complete; and the issue was a person's mental condition, which could well fluctuate significantly over the years that would certainly intervene before Petitioner's execution became truly imminent.

In fact it is now almost 3 years since the June, 1994, hearing held by the District Court. The Motion itself (at 6) quotes Respondents' counsel's argument in his Reply on Motion for Summary Judgment: "To do a competency determination now [December 1993] would be futile, because it will certainly have to be repeated when the time for execution [now set for May 1997] finally arrives." And that is precisely what has transpired. Suppose that the competency claim actually had been litigated in 1994; the determination made then would have been so stale by this time that a new hearing would have to be held – just as has been done. Thus, it is plain that, regardless of what the parties or the District Court believed or did in 1993-94, nothing would be different: Petitioner would still have to litigate the competency claim *now*, irrespective of whether he had done so then, and at this time it inevitably is successive. In shore, it is the nature of the claim, not the arguments made by Respondents, which places Petitioner in the position he now occupies.

3. Page 3 of the Motion misleadingly states that, "After denying Petitioner's requests for expert assistance and testing, the state court ruled that Petitioner was competent," as if Petitioner had been precluded from presenting any expert evidence at all. The only "expert assistance" denied was an evaluation by a retardation specialist, Dr. Denis Keyes, who unexplainedly was not

requested until just one week before the continued evidentiary hearing was to resume. As the hearing transcripts previously lodged with this Court demonstrate, Petitioner presented live testimony of Dr. Leonardo Garcia-Bunuel (Spanish-speaking psychiatrist), Dr. Bertha Imaz (psychiatrist from Mexico), and Dr. Joseph Geffen (Spanish-speaking psychologist), as well as a videotaped deposition by a well known neurologist, Dr. Jonathan Pincus, all of whom submitted written reports and willingly testified that Petitioner is retarded or brain-damaged. Hence, the trial court was thoroughly justified in concluding that testimony from Keyes would not be particularly helpful to its decision-making.

The tests requested were of two types. The first sort is magnetic resonance imaging (MRI) of Petitioner's brain. However, a report by Petitioner's own witness, Dr. Geffen, conceded that, "Although an MRI test could be useful, the results would mostly shed light with respect to 'structural' abnormalities of the brain as opposed to functional ones." (Report of 4/2/97 at 5.) This amounts to a concession that the MRI testing would not produce any relevant information, because the point of concern is not abstract information about the structural abnormalities of Petitioner's brain, but only the single narrow issue of whether he understands that he is to be executed because he has been convicted of murder. If anything, that is a "functional" issue, which Geffen said the MRI would not address. Thus, the delay (likely the real object of the motion), transportation difficulties, etc., involved in arranging for such testing of Petitioner would have been utterly pointless.

The situation is similar with regard to the other sort of testing suggested, the "neurometric EEG," which Geffen's same report at 5 indicates is also known as "computereized EEG" or "brain mapping." The Arizona Court of Appeals upheld exclusion of "brain electrical activity mapping (BEAM)" evidence in a first degree murder case, where the system was described as "a computerized method of displaying and interpreting EEG . . . data," because "there was substantial evidence from which the court could conclude that BEAM is not generally accepted in the neurological community." *State v. Zimmerman*, 166 Ariz. 325, 327-29, 802 P.2d 1024, 1026-28 (Ct. App. 1990). As a merely experimental procedure, it was not something the court needed to receive as evidence. (*Id.*) The same result was reached in the only other case concerning brain mapping discovered by counsel for Respondents, *Head v. Lithonia Corp., Inc.*, 881 F.2d 941 (10th Cir. 1989). Thus, Petitioner was seeking what amounted to a stay of his execution to allow for testing of a sort not even accepted within the relevant medical circles.[2]

4. The Motion at 3 mischaracterizes the Superior Court's ruling, when it says that the court did not resolve the disputed facts. The full text of the ruling (Minute Entry of 5/9/97) has been submitted to the Court. While it does not take the time to analyze the details of the conflicting statements made by the various experts in the manner that an advocate might, it plainly did resolve the

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[2] The Court should also be aware that the records submitted to the Superior Court showed that a regular EEG was conducted of Petitioner in 1993, and found to be normal.

sole factual issue before it, specifically concluding that, "Defendant is aware that he is to be punished for the crime of murder and that he is aware that the impending punishment for that crime is death." Therefore, whenever the Court encounters a statement like that on pp. 4-5, that Petitioner "is unaware of his pending execution and the reasons for it," it should recognize that Petitioner is merely disagreeing with a well-grounded factual determination made by the state court – the kind of factual determination to which all federal courts are bound to defer, even by non-AEDPA habeas jurisprudence.

It should also be noted that the Motion at 10 misleadingly says that the Superior Court concluded Petitioner "had failed to prove that he was not competent to be executed *and thus* he was unaware that he is to be punished for the crime of murder and that the punishment for that crime is death." (Emphasis added.) "Thus" as used here signifies a result of consequence (see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) at 2388), so that the Motion paints Judge Johnson as concluding that Petitioner is aware that he is to be punished for murder by the death penalty *because* Petitioner failed to carry the burden of proving that he is incompetent. In fact, the findings regarding Petitioner's failure to satisfy his burden of proving incompetence and specifically concluding that Petitioner does know that he is to be punished for murder by the death penalty are in separate, individually numbered paragraphs of the order. It therefore is plain that Judge Johnson found, not only that Petitioner had not satisfied his burden of proving incompetence, but also that the evidence presented affirmatively demonstrated Petitioner's full awareness of his situation.

5. The Motion endlessly repeats statements to the effect that *all* federal jurisdiction over Petitioner's claim is being lost. Not true; as page 3 of the District Court's order (attached to the Motion) itself points out, it is only *district court* review which is being precluded by application of the habeas amendments, so that Petitioner still can seek federal review by petition for certiorari or original habeas petition to the Supreme Court.

6. The District Court delivered itself of *dicta*, expressing its opinion that Petitioner is not malingering, but suffers from such mental problems that he is not competent. (Motion at 11-12.) However, this Court must recognize that that opinion is utterly lacking in a current factual basis, merely harking back to what the District Court *thought* it saw during its hearing in 1994. The record of the current, 4-day Superior Court hearing was not before the District Court (who currently is trying a case in Texas and conducted the May 15 hearing telephonically). Had Judge Bilby read the current record he would have learned that the parties stipulated to avowals of what testimony would have been given by a number of correctional officers in daily contact with Petitioner in the prison. Those uncontroverted avowals showed that Petitioner had conspicuously changed his behavior, in a manner indicating malingering, by going from a routinely well-groomed and hygienic inmate, to a state of exaggerated neglect (such as his hair sticking up and out, in what was variously described as the "Don King mode" or "like a person would have stuck his finger in a light socket"), just in time for the 1994 District Court hearing regarding his mental condition – and then went back to proper personal upkeep after the hearing concluded. (R.T.

of May 8, 1997, at 164-65, 168.)[3] Although the Motion cannot put in issue the state court competency hearing, this Court must not be influenced by the District Court's out-of-date and clearly inaccurate *dicta* in resolving the issues which are before it.

With a correct understanding of the facts, the Court may now turn to those issues.

C. Reasons To Deny All Requested Relief.

I

NO CERTIFICATE OF APPEALABILITY OR PROBABLE CAUSE REGARDING THE APPEAL OF THE RULE 59 MOTION SHOULD BE GRANTED.

Petitioner begins by requesting that a certificate of probable cause (a requirement for the hearing of an

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[3] Similarly, Dr. Bradley Johnson, Petitioner's prison psychiatrist in 1995-96, personally observed Petitioner change instantly from an entirely ordinary "affect," laughing and responding to the TV show he was watching, to a depressed, nonresponsive condition (which is fundamental to the negative diagnoses made of Petitioner by many persons having only brief contact with him) – when Petitioner realized that the doctor was observing him. (R.T. of May 7, 1997, at 207-09.) Although Petitioner claims to experience hallucinations, he does not react to them as people actually hallucinating do. He does not become distracted by or talk back to the "voices." (*Id.* at 204-05, 219-20.) When pressured to describe the bird he supposedly sees, Petitioner could not do so, claiming that he could not see it well because of his poor eyesight! (*Id.* at 205.) Since hallucinations have nothing to do with ordinary sight (even the blind being capable of hallucinating), this casts grave doubt on the veracity of his reported visions. (*Id.* at 205-06.)

appeal under pre-AEDPA law) be issued, permitting appeal of the denial of his Rule 59 motion. (Motion at 12-14.) The District Court applied the AEDPA, and denied the certificate of appealability required by the amended statute. Here events have overtaken Petitioner's pleading, the Court having ruled on May 16 that it will not grant a COA either. Thus, this request for relief would seem to have been effectively resolved against Petitioner by the Court's May 16 order.

Petitioner undoubtedly would disagree, since he contends that this should be treated as a pre-AEDPA case, to which the arguably lower CPC standard should be applied. Respondents believe that the Act does apply to this case. Neither of the cases on which Petitioner relies, *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996), and *Naddi v. Hill*, 106 F.3d 275 (9th Cir. 1997), dealt with a procedural picture comparable to the one in this case. This Court specifically stated in *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir. 1997) – which, despite showing up in an earlier reporter than *Naddi*, was decided after it – "We have not decided whether the amendments to section 2253 requiring a certificate of appealability apply to cases in which no CPC had been issued as of the effective date." There was, of course, no CPC which had issued with respect to the new and separately appealable Rule 59 issue. To permit the CPC from Petitioner's original appeal to make this a pre-AEDPA case defies logic in two ways: first, the competency claim was not even at issue in the original appeal (80 F.3d at 1309 n.1); second, to allow the original CPC to cover a wholly separate, post-appeal motion like this one (implicitly allowing a petitioner to spin out a whole series of legally and logically distinct

appeals based on the issuance of a CPC at some point in the distant past) seems to be the sort of evasion of the requirements of the AEDPA which *Greenawalt* says is not permissible. 105 F.3d at 1275.

However, it is not necessary to resolve this issue, because just as in *Greenawalt* (*id.* at 1273), Petitioner loses even if the lesser CPC standard is applied to him. As this Court pointed out in its May 16 decision (at 2-3), the District Court's denial of the Rule 59 motion was certainly not an abuse of its discretion; indeed, the Rule 59 motion's plea to hold the case in abeyance, to avoid application of the AEDPA, is precisely the argument rejected by *Greenawalt*. 105 F.3d at 1273-75. Since the District Court's ruling was clearly correct, Petitioner cannot show an entitlement to any sort of certificate.

And this is so, even if the District Court's ruling was based on a mistaken belief that a subsequent petition concerning the competency claim would not have to be treated as successive, because the ultimate ruling was correct and Petitioner was not prejudiced. *Greenawalt*, 105 F.3d at 1275-76. The claimed prejudice is a lack of district court review of the competency for execution claim. However, even the District Court recognized that, even under the AEDPA, Petitioner still has a right to federal review, by means of certiorari petition or original habeas application to the Supreme Court. While such review is rather limited, it is not meaningfully different from what Petitioner could have obtained in the District Court, which would not have been free to conduct its own hearing and reach its own conclusions regarding Petitioner's competency, but rather, would have been

required to defer to the well-grounded factual determination made by the Arizona courts that Petitioner understands his situation.

The United States Supreme Court has repeatedly held that other sorts of competency determinations are factual matters, based largely on assessment of demeanor and credibility, so that the trial judge's conclusions must be accepted if supported by the record. *See Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S. Ct. 2223, 2225, 109 L. Ed. 2d 762 (1990); *Miller v. Fenton*, 474 U.S. 104, 112-17, 106 S. Ct. 445, 451-53, 88 L. Ed. 2d 405 (1985); *Maggio v. Fulford*, 462 U.S. 111, 116-18, 103 S. Ct. 2261, 2263-64, 76 L. Ed. 2d 794 (1983). Although not specifically stating it in those terms, it is evident that all of the opinions in the seminal case on the constitutional requirement of competency for execution, *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), contemplated that this same standard of review would apply to determinations of competency for execution, as demonstrated by the lengthy discussions of whether Florida's procedures would entitle the competency finding made there to the deferential treatment normally accorded to state court findings of fact.

Federal cases applying *Ford* have treated state court determinations of competency for execution as issues of fact, to be deferred to if supported by the evidence. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.), *cert. denied*, 115 S. Ct. 1841 (1995) ("Based on its findings at the evidentiary hearing, the state court made a factual determination that Weeks was competent."); *Shaw v. Armontrout*, 900 F.2d 123, 126 (8th Cir. 1990) (review of record showed fair support for state court's findings and,

since habeas court must defer to state court factual determinations, "the state court's decision that Shaw 'understand[s] the nature and purpose of the punishment about to be imposed upon him' and is competent to be executed disposes of Shaw's eighth amendment claim."); *Graham v. Lynaugh*, 854 F.2d 715, 720-21 (5th Cir. 1988) ("the state court's findings must be given a presumption of correctness unless one of the conditions provided in section 2254(d) is established," and the trial court's factual finding of competency for execution was fairly supported by the record, despite conflicting opinions by various experts). Although this Court apparently has never had occasion to address competency for execution before, it did recognize competency to stand trial and waive counsel (which plainly demand far more of the person involved than competency for execution) as factual matters, concerning which state court findings supported by the record must be deferred to, in *Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986). In short, Petitioner would not receive anything from the District Court review he claims to have lost that is essentially different from the sorts of federal review still clearly open to him, so he has suffered no cognizable prejudice.

Here and throughout the Motion Petitioner invokes the judicial estoppel rule of *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991), to argue that Respondents should be precluded from raising any "procedural objection to the federal review of Petitioner's competency claim." Petitioner's reliance on *Russell* is clearly misplaced. There the representatives of the state affirmatively and explicitly contended that habeas review of Russell's claims was improper because he still had an

"adequate and available" state remedy for those claims, but reversed position when the case was sent back to the state courts and claimed that no relief was available. (*Id.* at 1037-38.) No such representations or reversal of course occurred in this case. Respondents contended in 1993-94 that the proper vehicle for Petitioner to litigate his competency for execution claim was a proceeding under the statute specifically designed for just such claims (not a Rule 32 proceeding), and that is what Petitioner has received; when he filed properly under A.R.S. § 13-4022, he got his hearing. Respondents contended in 1993-94 that the issue of competency for execution should not be determined in that habeas proceeding because it was not ripe to be heard, and the chronology of the case has borne out that position; as anticipated, it took years to resolve the rest of the issues and get Petitioner to a position where execution is imminent, so a competency determination made in 1994 would have been a futile act.

The crux of Petitioner's complaint really is nothing deceptive done by Respondents but rather the restriction on successive petitions enacted by the AEDPA, and that is not grounds for criticizing Respondents' conduct or for granting Petitioner any relief:

> [W]e require state prisoners to exhaust their claims in state court before coming to federal court with a habeas corpus petition. We adhere to that requirement even though Congress and the Supreme Court periodically modify the rules governing the availability of habeas corpus relief in federal court. We acknowledge that the Act may have worsened Greenawalt's legal position while he was exhausting his state remedies; undoubtedly, there are many state prisoners in the same situation. But Congress intended to restrict the availability of habeas corpus relief when it passed the Act, and the Supreme Court has held that the Act is constitutional. *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). The district court correctly refused to help Greenawalt evade its requirements by accepting a federal petition which was plainly and concededly premature.

105 F.3d at 1275. By the same token, Petitioner's competency claim was "plainly and concededly premature" at all times before now, so it was properly not resolved in 1994, and the District Court here "correctly refused to help [Martinez-Villareal] evade [the AEDPA] requirements" by holding the competency claim in abeyance while it was still being exhausted in the state courts.

Petitioner's related ploy of involving *Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996), is equally unavailing. In *Burris* the petitioner was litigating a petition which included only guilt-phase claims because he has been resentenced and the appeal of the resentencing was still pending in the Indiana Supreme Court, but the state's representative affirmatively told the habeas court to rule right away, even though the petition plainly was premature because the sentencing part of the case was not yet exhausted. "The state did not refer to the petition's prematurity at the hearing . . . " (*Id.* at 471, Judge Manion concurring.) When Burris returned with his sentencing claims and the state argued that it was a successive petition Burris was deemed to have detrimentally relied on the state's previous silence. That, of course, is just the opposite of what occurred here, where Respondents *did* raise the prematurity of the competency for execution claim. Here

Petitioner's complaint seems to be that Respondents didn't say enough, in not warning that adverse consequences might follow from litigating that claim in a second petition. However, if the claim was not resolved in the first petition, *any* federal review of it would obviously come in a *second* or later (*i.e.*, successive) petition, so the simple facts of the situation were sufficient to put Petitioner and his counsel on notice that there might well be problems with the issue when it did become ripe for determination. That *Burris* is not to be read as Petitioner seems to wish, that the state is liable to waive its procedural defenses to successive petitions if it does not tutor the petitioner in the possible implications of his litigation decisions, is explicitly debunked by the *Burris* concurrence. (*Id.* at 470-72.) Thus, *Burris* has little utility beyond its own unique facts.

Moreover, that *Burris* does not control here is demonstrated by *In re Medina*. There the petitioner also invoked *Burris*, arguing that he should be able to present a competency for execution claim in a successive petition, which he had intentionally not raised in his first petition because the law of competency under *Ford v. Wainwright* "binds the issue temporally to a particular set of facts that did not obtain" at the time of his first petition. 109 F.3d at 1562. Thus, Medina's failure to litigate the competency claim in his first petition was the result of the defense's (correct) understanding of the law, just as the failure to litigate it in this case was the result of the defense's (and District Court's) correct understanding that Petitioner's claim was premature when raised in 1993-94. The Eleventh Circuit concluded that that was not the sort of "detrimental reliance" which had occurred in *Burris*.

Since this case is not meaningfully distinguishable from *Medina*, this Court should likewise conclude that there has been no cognizable "detrimental reliance" by Petitioner.

In the vague concluding paragraph of this argument (Motion at 14) Petitioner attempts to dragoon Respondents into some sort of support for his position; Respondents decline the invitation. Nothing argued supports the claim that any kind of a certificate should be issued concerning the denial of the Rule 59 motion.

II

PETITIONER SHOULD NOT BE GRANTED LEAVE TO FILE A RULE 60(B) MOTION.

Although reframed in terms of a request for permission to file a Rule 60(b) motion, the next section of this Motion (pp. 14-19) is essentially a reprise of the arguments from the first section which are refuted above. Therefore, they will not be responded to at length. However, several observations are in order.

Petitioner relies upon *Carriger v. Lewis* for the proposition that this Court should grant him permission to go back to the District Court and file a Rule 60(b) motion. (Motion at 14.) However, even while he invokes *Carriger* he has failed to follow it. *Carriger* points out that the filing of a notice of appeal divests a district court of jurisdiction, so it lays out the procedure to follow when a case is already in the jurisdiction of this Court: file a motion in the district court, asking it to indicate its willingness to entertain the motion, and only after a ruling has been made on such a request, come to this Court and

seek a remand. 971 F.2d at 332. While Petitioner speculates that the District Court would be willing to entertain a Rule 60 motion (and may well be right), the fact remains that he has not followed the procedure laid out for him in *Carriger*.

However, regardless of whether the District Court would be willing to hear a Rule 60 motion, it is clear that no such remedy would be proper, so there is no reason to grant the remand. The proper parameters of such a motion were addressed in *Greenawalt*, 105 F.3d at 1273, which points out that such relief is available only in "extraordinary circumstances," and presupposes the existence of an erroneous judgment which causes identifiable prejudice to the movant. Those requirements are not satisfied here. The District Court was constrained by the law to do what it did, both in originally finding the competency for execution claim premature and in denying the Rule 59 motion which attempted to keep the unexhausted competency claim in the federal court while the state proceedings concerning it were on-going. To whatever extent either of those ruling was based on an erroneous understanding of what sort of federal remedies were still open to Petitioner, the fact remains that they were correct, so Petitioner can demonstrate neither a wrong ruling nor cognizable prejudice; the claim made here is legally indistinguishable from the one rejected by this Court in *Greenawalt*, where the District Court also was confused about the effects on the litigation of the AEDPA. (*Id.* at 1273-76.) Therefore, Petitioner is not entitled to the relief he requests.

This conclusion is not altered by Petitioner's reiteration of his *ad hominem* attacks on counsel for Respondents, citation of Rule 60(b)(3), and invocation of *Russell v. Rolfs* and *Burris v. Parke*. As demonstrated above, his complaints are factually baseless as well as legally unfounded. It is worthy of note that the District Court, as upset as it evidently is about its position in this case, has never made a finding supportive of Petitioner's claims of misconduct against counsel for Respondents. Its order (at 2) acknowledges that Respondents argued that the issue was not ripe in the first habeas petition, not only because there was no execution warrant, but also "because the Petitioner's competency could change over time," thereby at least implicitly conceding that the nature of the claim prohibited meaningful adjudication until execution was imminent. The only thing recognized by the District Court's order as having affected the posture of the case is the passage of the AEDPA (not any misrepresentation or change of position by Respondents), which, of course, took place years after the litigation in question, and which Respondents could neither anticipate nor control. Petitioner's pejorative advocacy cannot obscure the utter absence of evidence of misconduct by Respondents, and the Court should not be swayed by the mere repetition of accusations.

Finally, it is worth repeating that Petitioner is wrong when he complains that he is "faced with no remedy at all." (Motion at 19.) He has a four-day evidentiary hearing in the Superior Court (twice what he got in front of the District Court in 1994). He has had review of that proceeding by the Arizona Supreme Court. Because of the requirement that the federal courts defer to the factual

findings of the state courts, that is effectively the only review he would have had even before passage of the habeas amendments. If he wishes to invoke them, he still has avenues of review by the United States Supreme Court. *In re Medina*, 109 F.3d at 1564. That is sufficient.

III

PERMISSION TO FILE A SUCCESSIVE PETITION NOT SUBJECT TO THE AEDPA SHOULD BE DENIED.

This argument (Motion at 19-21) again merely parades the same contentions under a different rubric. Petitioner persists in asserting that he will be deprived "completely" of the right to be protected from execution while incompetent, and that he is going to have his habeas rights "suspended completely." (*Id.* at 20, 21.) As described above, that simply is not true; it is only district court review which is removed, and that is a negligible loss in a case like this, where the District Court's role would have been limited to agreeing with the well-founded factual determination made by the state courts. And contrary to the assertion that the test of the AEDPA does not indicate an intent to divest federal courts of jurisdiction to enforce any federal constitutional rights, at least in the context of successive petitions, the Act does exactly that, by prohibiting consideration by the lower federal courts of any claims going to sentence, even in a capital case. *See Greenawalt*, 105 F.3d at 1277 (claim of ineffective assistance in capital sentencing precluded in successive petition by Act); *Greenawalt v. Stewart*, 105 F.3d 1287, 1288 (9th Cir. 1997) (constitutional claim against

lethal injection as mode of execution precluded in successive petition). The case Petitioner relies on, *Breard v. Angelone*, 926 F. Supp. 546 (E.D. Va. 1996), was decided before the Supreme Court decision in *Felker v. Turpin* and thus no longer is viable authority.

Petitioner claims he should be allowed to file a successive petition, unrestrained by the Act, because of the "unprecedented" circumstances of this case. An identically phrased request was rejected by this Court in *Greenawalt*, 105 F.3d at 1277. The arguments are no more persuasive here than they were in that case, so the Court should deny the request here as well.

IV

THE COURT SHOULD NOT RECALL ITS MANDATE IN THE PRIOR APPEAL IN ORDER TO HEAR THIS CLAIM.

Petitioner also urges this Court to recall its mandate in the prior appeal, in order to "retain jurisdiction over his present competency claim." (Motion at 4, 21-23.) There are several substantial reasons not to do so.

The very case on which Petitioner relies to show that the Court possesses the authority to recall its mandate emphasizes that that authority is a matter of discretion, and that it "should be exercised only in exceptional circumstance." *Zipfel v. Halliburton Co*, 861 F.2d 565, 567 (9th Cir. 1988). That same standard applies even in capital cases. *See Greenawalt*, 105 F.3d at 1276; *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); and *Williams v. Calderon*, 83 F.3d 281, 289 (9th Cir. 1996) – requests for recall denied in all three cases. "Mandates are rarely recalled, because only exceptional circumstances will override the strong

policy that there be an end to litigation." FEDERAL APPELLATE PRACTICE GUIDE – NINTH CIRCUIT § 9.18 at 9-44 (1944).[4] "In general, we will recall a mandate only when we are animated by 'an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice." *Nevius v. Sumner, supra.*

This clearly is *not* such a case. The obvious purpose of the request is to somehow get this case back to "square one," prior to enactment of the AEDPA. But it must be recalled that at the time of the original District Court proceedings the competency claim was inescapably "premature," because no hearing had been sought or held under the proper state remedial provision, A.R.S. § 13-4022. *Martinez-Villareal v. Lewis*, 80 F.3d at 1307. Therefore, the District Court would not have been authorized to do anything except dismiss the claim; there was

[4] "The strong policy that there be an end to litigation" is particularly potent in this case. Not only has the Supreme Court repeatedly recognized that it is a grave affront to the dignity of a state which has exercised its sovereign authority to sentence and punish criminals to subject it to repetitious federal review through habeas corpus, but the Arizona Constitution bestows on victims and their families a right to speedy adjudication and closure of criminal cases, including post-conviction proceedings. "We are obligated by the Arizona Constitution to attempt to protect the rights of the victims of crime, which includes the right '[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.' Ariz. Const. art. 2, § 2.1(A)(10)." *State v. Mata*, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996). While not binding on this Court, this provision certainly creates another substantial interest weighing against recall of this Court's mandate from the previous appeal.

nothing for it to legitimately "review" at that point. If Petitioner elected to dismiss only the competency claim and proceed with the rest of his petition while he was exhausting that claim through state court proceedings, it was subject to being dismissed as successive when he brought it back to federal court, quite aside from the AEDPA, pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). On the other hand, suppose Petitioner chose to dismiss his entire petition until he could exhaust his competency claim, and then bring a completely exhausted petition into the District Court. The only "review" available would have been deferential to the factual determination of competency made by the state courts; absent a showing of cause and prejudice, Petitioner would not be entitled to an evidentiary hearing in the federal court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). There being no reason to assume that the proceedings would be different in any other respect, it still would have taken Petitioner three years to get to the point of actually facing execution, at which time he would raise precisely the same claim (the former determination of "current" competency now arguably having become stale and inaccurate) – and again be presenting a successive petition.

The situation here is rather similar to the one presented in *Nevius v. Sumner*, where the petitioner sought to have the mandate recalled "to reopen the proceeding so that he may present new claims that now cannot be addressed in a subsequent petition," due to the decision in *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), and passage of the AEDPA. 105 F.3d at 461. This Court's statement in its first *Nevius* opinion,

that efforts should be made to present any additional evidence to the state courts, and thereafter the matter may be addressed in federal court, did not constitute a guarantee that he would not face procedural barriers (*id.*), anymore than Respondents' contention that Petitioner's claim was not ripe was a guarantee that he would later be exempt from whatever procedural barriers existed when the claim became ripe. There being no evidence that Nevius could have litigated his additional claim in a way that would have avoided the preclusive effect of *McCleskey*, it was evident that the unfairness he was complaining of was merely the legal landscape created by *McCleskey*, "an argument foreclosed by *McCleskey* itself." (*Id.* at 461-62.) Similarly, the "unfairness" Petitioner complains of is merely the result of the passage of the Act, not something anyone has invidiously done to him.

This Court refused to recall its mandate in *Nevius*. This Court also was emphatic in *Greenawalt* that the federal courts should not help habeas petitioners to evade the requirements of the AEDPA by bizarre procedural ploys. 105 F.3d at 1275. The same is true here, so the request for this Court to recall its mandate should be denied.

V

NO STAY OF EXECUTION SHOULD BE GRANTED.

Petitioner's final request, for a stay of execution, asks the Court to delay things long enough that the scheduled execution cannot take place. However, since all of the supportive arguments are transparently meritless, the request should be denied.

CONCLUSION

No adequate grounds for a stay or any other relief having been presented, all of Petitioner's motions should be denied forthwith.

DATED this 19th day of May, 1997.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CAPITAL CASE: EXECUTION SCHEDULED FOR 12:05 A.M. MAY 21, 1997

Nos. 97-80229, 94-99011, 94-99012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
TERRY STEWART, et al.,
Respondents/Appellees.

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
SAMUEL LEWIS, et. al.,
Respondents/Appellees.

REPLY TO OPPOSITION TO MISCELLANEOUS RELIEF

The State's opposition to Mr. Martinez-Villareal's motions contests many things, but it leaves uncontested several crucial points.

1. The District Court's dismissal orders, and its order denying reconsideration of the dismissal dated March 24, 1997, were based on a mistaken understanding of the law – a belief that its jurisdiction to consider Mr.

Martinez-Villareal's present competence claim would not be affected by those orders. Respondent now suggests (but does not directly say) that it, too, did not understand that the dismissal orders would have this legal effect "until weeks later, after Petitioner's notice of appeal had been filed on April 17 . . . " Resp. Mem. Opp. 6. That suggestion may rebut the appearance that the Respondent deliberately waited to notify the District Court of its changed position until the District Court lost jurisdiction over the case; but it does not change the fact that the legal premise of the District Court's exercise of its discretion was legally erroneous. It therefore does not eliminate the principal reason on which Mr. Martinez-Villareal has based his request for leave to appeal. *See* Motion for CPC, etc., at 14-16.

2. Respondent also agrees that all state remedies on this issue have now been exhausted (Resp. Mem. Opp. At 4-5), and does not dispute the fact that no claim of nonexhaustion was ever made in the District Court, prior to the entry of the dismissal orders. Respondent's characterization of its position in 1993-1994 (Resp. Mem. Opp. At 13) suggests that it made a nonexhaustion argument then; but it clearly did not. The motion for summary judgment that Respondent filed in lieu of an answer under Habeas Rule 5 made no claim of nonexhaustion, as to any issue.[1]

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[1] *See* Except of Record, *Martinez-Villareal v. Lewis*, Nos. 94-90011/12 at 321-371. With regard to present competence, the Respondent's motion argued exclusively that the claim was not "ripe" because no execution warrant had been issued by the Arizona Supreme Court. *See id.* at 363, 365. Its conclusion was "if a warrant for his execution issues, and if he still claims to be incompetent at that time, there will be a jurisdictionally

Habeas Rule 5 requires that an answer to a habeas corpus petition "shall state whether the petitioner has exhausted his state remedies including any postconviction remedies available to him . . . " The failure to raise any claim of nonexhaustion, in an answer or elsewhere in District Court, waives the claim. Respondent thus says nothing to rebut Appellant's position that nonexhaustion has been waived here.[2]

3. Respondent's arguments on the factual merits of the competence claim (Resp. Mem. Opp. 7-9), only underscore the powerful factual disputes that underlie this issue.[3] Those disputes were acknowledged in the state

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sufficient case or controversy, and that will be the time to litigate the issue." ER 365. That argument, which cited Article II of the Federal Constitution, plainly conceded future federal, rather than state litigation.

[2] Moreover, with the Arizona Supreme Court's May 16, 1997 Order, there has now been exhaustion of all state remedies. Nonexhaustion therefore could not be the basis for a dismissal order on remand. *Sharpe v. Buchanan*, 317 U.S. 238 (1942); *Thomas v. Teets*, 205 F.2d 236, 240 (9th Cir. 1953) ("it is the condition of the habeas corpus proceeding as it is in the appellate court which is determinative); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984). It therefore could form no basis for this Court's affirmance of the District Court, even if it was properly raised now.

[3] For example, Respondents contend that if the District Court had heard the testimony presented at the recent state court hearing, he would have learned of "uncontroverted avowals" showing that Petitioner "had conspicuously changed his behavior, in a manner indicating malingering" in time for the district court hearing and then went back to "proper personal upkeep" after the hearing concluded. Respondents' characterization of this testimony is misleading. What Respondents do not mention is that the time frame for these

court's decision denying Mr. Martinez-Villareal relief, and by two of the concurring Justices of the Arizona Supreme Court who agreed that "the evidence makes it clear that defendant is mildly retarded and seriously mentally ill." *Martinez-Villareal v. Pinal County Superior Court, et al.*, Ariz.Sup.Ct. No. CV-97-0206-SA (filed May 16, 1997), at 3. Judge Bilby, who has heard extensive evidence on this same claim, plainly shares that view, and believes the present competence claim has probable merit. Whether review of the present state court record would change his view is the question to be decided on remand. Whether Mr. Martinez-Villareal's competence is

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events coincides exactly with the prison doctors' withdrawal of Mr. Martinez-Villareal's medication before the hearing, and then their resumption of his medication after the hearing concluded. Then treating DOC psychologist Ram Gopalon after testifying at 1994 evidentiary hearing in federal court, and observing other testimony, changed his diagnosis for Mr. Martinez-Villareal back to schizophrenia and resumed medicating Mr. Martinez-Villareal for this condition, including increasing the dosage of the psychotropic medication. This is the reason Mr. Martinez-Villareal was able to manage some basic personal hygiene.

Respondents also do not mention that the guards' testimony was that Mr. Martinez-Villareal lives in a highly structured environment and has very little opportunity to exhibit any kind of problem-solving skill or behavior. He is almost constantly withdrawn and his affect almost constantly flat with only a few exceptions. He do not talk to anyone and has no friends. The only English he understands is that related to his daily routine, in other words, concrete commands like "shower," "shave" and "food." The state's expert, Dr. Johnson, testified that the behavior reported by guards is consistent with the behavior exhibited by long term psychiatric residential patients.

viewed as a question of fact or one of law – a difficult and unresolved issue,[4] even if this is deemed a factual question, the adequacy of the state court hearing on it, and the adequacy of the state court record supporting it, are still subject to independent federal review. *See* 28 U.S.C. §2254(d). That review cannot be conducted without the state court record, which Respondent concedes has not yet come before the federal court. *See Hamilton v. Vasquez*, 882 F.2d 1469 (9th Cir. 1989).

Respondent cites *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997), *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), and *Nevius v. Sumner*, 105 F.3d 463 (9th Cir.), *petition for rehearing and suggestion for rehearing en banc pending*, but ignores the key distinction between this case and those: in this case, the initial federal habeas corpus proceedings have not ended. The arguments Petitioner is making here are not made solely in support of the filing of a successive petition, as in all those cases, but of an appeal from the dismissal of his first habeas corpus petition, which has never fully been resolved.

4. With regard to Petitioner's argument that he should be permitted to proceed in a successive posture, without the additional barriers of the AEDPA, Respondent has provided no good distinction between this case

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[4] The cases Respondent cites predate Thompson v. Keohane, 116 S.Ct. 4576 (1995), which cast new light on the fact/law distinction under §2254. Even before Thompson, competence claims presented were difficult to categorize in this regard. *See* 1 Liebman & Hertz 578-581 & n.55 (2d ed. 1994) (collecting cases regarding conflict in the circuits as to whether competence to stand trial is a factual or mixed factual/legal issue).

and *Burris v. Park*, 95 F.3d 465 (7th Cir. 1996). There is no distinction between this case and *Burris* based on *Medina*; what *Medina* provides is the same sort of procedural barrier to a successive litigation of a competence claim, that would have barred Burris's claim under the Seventh Circuit's decision that the AEDPA is retroactive. The crucial point for the majority in *Burris* was the inequity that failing to make an exception to that bar would create. Those inequities are different from and far greater than those in *Greenawalt*, *Nevius*, and *Medina*. They clearly favor allowing the meaningful litigation of Petitioner's present competency claim, in federal court, which Petitioner has applied for and been promised for years.

Dated this 19th day of May, 1997.

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/s/ Denise I. Young

Ramon MARTINEZ-VILLAREAL,
Petitioner/Appellant,

v.

Terry STEWART,
Respondent/Appellee.

Ramon MARTINEZ-VILLAREAL,
Petitioner-Appellee/Cross-Appellant,

v.

Terry STEWART,
Respondent-Cross-Appellant/Appellee.

Nos. 97-80229, 94-99011 and 94-99012.

United States Court of Appeals,
Ninth Circuit.

May 19, 1997.

After petitioner, who was convicted of murder, was unsuccessful in several state post-conviction relief petitions, the Court of Appeals denied relief on federal habeas corpus petition, 80 F.3d 1301, holding that petitioner's claim that he was incompetent to be executed was premature. After state court denied relief on claim that petitioner was not competent to be executed, petitioner moved for stay of execution, leave to file subsequent petition in district court, certificate of probable cause, remand to file motion for relief from judgment, and motion to recall mandate. The Court of Appeals held that: (1) claim that federal courts were foreclosed from hearing claim on competency to be executed warranted stay of execution, and (2) petitioner would not be granted remand and leave to file motion to set aside judgment in district court.

Execution stayed; supplemental briefing ordered; other motions denied.

Before: D. W. NELSON, LEAVY and T. G. NELSON, Circuit Judges

Ramon Martinez-Villareal moves this court for, inter alia, a stay of execution and leave to file a subsequent petition in district court. For the reason explained below, we stay the execution and order further briefing.

I

Background

Martinez-Villareal was convicted of murder in Arizona and his conviction and sentence of death were upheld by the Arizona Supreme Court. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). Martinez-Villareal was thereafter unsuccessful in several State post-conviction relief petitions, and we denied relief in *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996). In that decision, we specifically held that Martinez-Villareal's claim that he was incompetent to be executed was premature. *Id.* at 1309, n. 1.

Martinez-Villareal returned to the courts of Arizona in February, 1997, by filing a "Motion Pursuant to ARS § 13-4022." Arizona's statutory scheme, as embodied in that section, authorizes the superior court to appoint experts and hold a hearing concerning a condemned prisoner's competence to be executed if a proper preliminary showing is made. The Arizona Superior Court held that

Martinez-Villareal had made a sufficient showing, and appointed the experts designated by Martinez-Villareal and the State. After denying Martinez-Villareal's motion to hold a portion of the statutory scheme unconstitutional because, *inter alia*, it placed the burden on Martinez-Villareal to demonstrate his incompetence, the court held a four-day evidentiary hearing which concluded on May 8, 1997. After the hearing, the court entered a written minute order in which it found, in part, as follows:

> 4. That the determination whether the burden of proof has been met may only be made after a careful review and analysis of all the evidence presented [to] the Court; that, upon review of all the evidence presented [to] the Court, this Court FINDS that the Defendant has failed to prove by clear and convincing evidence, or by the lesser standard of preponderance of the evidence, that he is not competent to be executed;
>
> 5. That the Court FURTHER FINDS that Defendant is aware that he is to be punished for the crime of murder and that he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villareal, is therefore competent to be executed under the laws of the State of Arizona.

Martinez-Villareal petitioned the Arizona Supreme Court for special action pursuant to ARS § 13-4022(G). The Arizona Supreme Court accepted jurisdiction but, on May 16, 1997, denied relief.

Martinez-Villareal moved to amend the district court's judgment, which had dismissed his incompetency claim without prejudice, and asked the district court to hold the claim in abeyance. Following the district court's

denial, Martinez-Villareal filed a notice of appeal. Both the district court and this court denied a certificate of appealability.

On May 16, 1997, counsel for Ramon Martinez-Villareal filed the following motions in this court: motion for stay of execution; motion for leave to file subsequent petition; motion for certificate of probable cause; motion for remand to file Fed.R.Civ.P. 60(b) motion; and motion to recall the mandate.

II

Stay of Execution and Leave to File Subsequent Petition

Martinez-Villareal has raised a competency to be executed claim under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). In doing so, he has presented a unique and fundamental constitutional challenge to a provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244 (1996). Martinez-Villareal asserts that a competency to be executed claim can never be heard by a federal court, and that this preclusion constitutes an unconstitutional suspension of the writ of habeas corpus. We find that his argument merits further consideration.

Ford v. Wainwright holds that the Eighth Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10, 106 S.Ct. at 2602. However, the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the State. *See Herrera v. Collins,*

506 U.S. 390, 406, 113 S.Ct. 853, 863-64, 122 L.Ed.2d 203 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution."). The federal district court and this court recognized this problem when both courts dismissed Martinez-Villareal's competency claim as premature. *See Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n. 1 (9th Cir.1996).

This principle must be read together with the Supreme Court's instruction in *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1297, 134 L.Ed.2d 440 (1996), that "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Once this stay has been issued, the execution is not imminent, and the competency to be executed claim becomes premature. Accordingly, it appears that this claim cannot be asserted in a first habeas petition.[1]

Under the AEDPA, the claim cannot be asserted in a second petition either. Section 2244 provides that

> (b)(2) [a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2) (1996).

The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateway provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed. *See In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir.1997).

The Constitution's Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be

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[1] This result is exacerbated by 28 U.S.C. § 2263, which provides that any application for habeas corpus relief under section 2254 "must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review." 28 U.S.C. § 2263(a). This statute of limitations is tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2). It is unlikely that a warrant of execution will issue before this clock expires.

suspended." U.S. Const., Art. I, § 9, cl. 2. Martinez-Villareal has demonstrated that a district court will never be able to hear his competency to be executed claim. Whether this amounts to an unconstitutional suspension of the writ depends upon whether the Supreme Court may entertain such a claim in the exercise of its jurisdiction over original habeas petitions.

This question remains unanswered after *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). In *Felker*, the Court concluded that the "gatekeeping" system of the new Act (codified at 28 U.S.C. § 2244(b)(3)), whereby a petitioner must obtain the permission of the court of appeals before filing a second or successive petition in the district court, "does not apply to our consideration of habeas petitions because it applies to applications 'filed in the district court.' " *Felker*, ___ U.S. at ___, 116 S.Ct. at 2339. The Court did not decide the question of whether it was bound by the restrictions imposed by section 2244(b)(2) and (3). *See id.* The question is an open one. *See Felker*, ___ U.S. at ___, 116 S.Ct. at 2339.[2] The Supreme Court noted that "[w]hether or not we are bound by [section 2244(b)'s] restrictions, they certainly inform our consideration of original habeas petitions." *Id.* At least on its face, section 2244(b) appears to apply to second or successive habeas corpus petitions even when presented originally to the Supreme Court. *See*

[2] We recognize that the Eleventh Circuit has confronted this precise issue. Although that court concluded that the AEDPA does not permit consideration of a competency claim, it did not expressly consider whether this violated the Suspension Clause. *See In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir.1997).

28 U.S.C. § 2244(b). If these restrictions apply even to the Supreme Court's original habeas jurisdiction, then relief on competency to be executed claims could never be granted by any federal court. This might result in an unconstitutional suspension of the writ of habeas corpus.[3]

Because of the importance of Martinez-Villareal's claim that the AEDPA unconstitutionally suspends the writ of habeas corpus for petitioners who present a competency to be executed claim, we issue a stay of execution and order the parties to submit supplemental briefing on this discrete question. Under the AEDPA, this court must decide within thirty days whether to grant or deny a motion to file a subsequent petition. *See* 28 U.S.C. § 2244(b)(2)(D). Accordingly, the stay shall not exceed thirty days from May 16, 1997, the date Martinez-Villareal filed his motion to file a subsequent petition. Martinez-Villareal shall file a supplemental brief addressing the constitutional issue within seven days of the date of this order. The State of Arizona shall respond within seven days of the date that Martinez-Villareal's brief is filed.

[3] *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.1997) (section 2244 forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence) did not decide this issue. Unlike Greenawalt's sentencing claim, Martinez-Villareal's competency to be executed claim cannot be decided in a first habeas petition.

III

Certificate of Probable Cause

Because in case No. 97-99009 we ruled on Martinez-Villareal's motion for a certificate of probable cause, we deny his identical motion in No. 97-80229.

IV

Remand to File Rule 60(b) Motion

Martinez-Villareal moves for remand and leave to file a Fed.R.Civ.P. 60(b) motion in district court. We deny the motion because: (1) there is no pending appeal to remand; and (2) Martinez-Villareal has pointed to no law requiring the court of appeals to authorize the filing of a Rule 60(b) motion in district court.

V

Recall the Mandate

Martinez-Villareal moves this court to recall the mandate issued in Nos. 94-99011, 94-99012. Because this court's decision to deny the competency to execute claim as premature was correct, we again decline to do so. Any available relief must be sought under current law.

MOTIONS FOR CERTIFICATE OF PROBABLE CAUSE AND FOR REMAND TO FILE RULE 60(b) MOTION AND TO RECALL THE MANDATE DENIED; EXECUTION STAYED; SUPPLEMENTAL BRIEFING ORDERED.

Ramon MARTINEZ-VILLAREAL,
Petitioner,

v.

Terry STEWART,
Respondent.

Ramon MARTINEZ-VILLAREAL,
Petitioner,

v.

Terry STEWART,
Respondent.

Nos. 97-80229, 97-80249.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 9, 1997.

Submitted June 9, 1997.*

Decided June 23, 1997.

Inmate under sentence of death moved to reopen his first habeas proceeding for consideration of his claim that he was not competent to be executed, which claim was originally dismissed without prejudice as premature. The United States District Court for the District of Arizona held that, as result of Antiterrorism and Effective Death Penalty Act (AEDPA), it lacked jurisdiction to consider that claim. Inmate then moved for permission to file successive petition. After staying execution, 118 F.3d 625, the Court of Appeals held that AEDPA's prohibition on

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* The panel unanimously finds this case suitable for submission without oral argument pursuant to Fed. R.App. P. 34(a) and Ninth Cir. R. 34-4.

second or successive petitions does not apply to petition that raises only competency to be executed claim which was originally dismissed without prejudice as premature.

Motion dismissed, petition transferred.

T.G. Nelson, Circuit Judge, issued specially concurring opinion.

Fredric F. Kay, Federal Public Defender, Denise I. Young, Assistant Federal Public Defender, Dale A. Baich, Office of the Federal Public Defender, Phoenix, AZ, Sean D. O'Brien, Public Interest Litigation Clinic, Kansas City, MO, for petitioner.

Bruce M. Ferg, Assistant Attorney General, Tucson, AZ, for respondent.

Application for Order to File Successive Petition for Writ of Habeas Corpus in the District Court for the District of Arizona.

Before: D. W. NELSON, LEAVY, and T. G. NELSON, Circuit Judges.

Order; Concurrence by Judge T. G. Nelson.

PER CURIAM.

Petitioner has moved for permission to file a successive habeas corpus petition in the district court pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. § 2244. We hold that § 2244's prohibition on second or successive petitions does not apply to a petition that raises only a competency to be executed claim under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

I.

Ramon Martinez-Villareal was convicted on two counts of first-degree murder and was sentenced to death. *See State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985). Martinez-Villareal filed a petition for habeas corpus in the federal district court on March 25, 1993. He asserted, inter alia, that he was not competent to be executed. The district court dismissed this claim without prejudice as premature[1] and granted the writ on other grounds. We reversed the district court's decision but explained that "[o]ur instruction to enter judgment denying the petition is not intended to affect any later litigation of [the competency to be executed] question." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n. 1 (9th Cir.1996).

On remand to the district court, Martinez-Villareal moved the court to reopen the first habeas proceeding. Martinez-Villareal feared that the newly enacted AEDPA would foreclose review of his competency claim on a

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[1] It was the State of Arizona that had suggested to the district court that Martinez-Villareal's competency claim was not ripe for adjudication. The State pressed the importance of having

> a single adjudication of competency, *at a time when all [of Martinez-Villareal's] other claims have been resolved and a warrant has been issued*, so that an execution actually is imminent within a reasonable period of time. . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

State of Arizona's Reply to Response to Motion for Summary Judgment, Dec. 17, 1993, at 45-46 (emphasis added).

second petition despite the parties' and the court's intention to address the claim once a warrant of execution had issued. On March 24, 1997, the district court denied the motion and reassured Martinez-Villareal that it had "no intention of treating the 'incompetency to be executed' claim as a successive petition."

On May 16, 1997, despite this assurance, the district court recognized that "as a result of the AEDPA, it does not have jurisdiction to entertain" Martinez-Villareal's competency claim. The district court noted that "the AEDPA effectively deprives all federal district courts of jurisdiction to entertain second petitions raising Eighth Amendment 'competency to be executed' claims." On May 19, 1997, we stayed Martinez-Villareal's execution to consider whether this is indeed the case and, if so, whether it constitutes a suspension of the writ of habeas corpus.

II.

Ford v. Wainwright holds that the Eighth Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10, 106 S.Ct. at 2602. However, the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the state. *See Herrera v. Collins*, 506 U.S. 390, 406, 113 S.Ct. 853, 863, 122 L.Ed.2d 203 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution.").

When Martinez-Villareal first raised his competency claim in federal court, the State of Arizona had not yet

issued a warrant of execution. Thus, although we disposed of every other claim raised by Martinez-Villareal in his first habeas petition, we declined to address his competency claim because it was premature. *See Martinez-Villareal*, 80 F.3d at 1309 n. 1.

Even if the State had issued its warrant of execution prior to our consideration of Martinez-Villareal's first habeas petition, his competency claim still would have been premature. In *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1297, 134 L.Ed.2d 440 (1996), the Supreme Court instructed that "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Once this stay has been issued, the execution is not imminent, and the competency claim becomes premature. Accordingly, a competency claim cannot be asserted in a first habeas petition.

Under the AEDPA, such a claim cannot be asserted in a second petition either. Section 2244 of the AEDPA divides the world of second or successive petitions into two categories: Those that raise claims that were presented in a previous petition, and those that raise claims that were not presented in a previous petition. A claim that was presented in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1). This sanction applies to a competency claim raised in a first petition even though that claim can never be adjudicated because it will always be premature. Accordingly, a petitioner must reserve his colorable competency claim and present it as a new claim in a second petition. But a claim that was not presented in a prior petition must be dismissed unless

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.) ("[T]he new 28 U.S.C. § 2244(b)(2)(B) forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997). It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed.

III.

We are asked to decide whether this predicament constitutes an unconstitutional suspension of the writ of habeas corpus. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2.[2] Martinez-Villareal has demonstrated that a district court will never be able to hear his (or anybody's) competency to be executed claim. Whether this amounts to an unconstitutional suspension of the writ depends upon whether *any* federal court is authorized to entertain Martinez-Villareal's competency claim.

We already have noted how the new statute precludes a federal district court from hearing a colorable competency claim on either a first or second petition. Thus, whether the writ has been suspended depends upon whether or not the Supreme Court may entertain a colorable competency claim in the exercise of its jurisdiction to hear original habeas applications.[3]

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[2] The State correctly observes that the writ known to the Framers "was quite different from that which exists today." *Felker v. Turpin*, ___ U.S. ___, ___, 116 S.Ct. 2333, 2339, 135 L.Ed.2d 827 (1996). But like the Supreme Court, we assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at ___, 116 S.Ct. at 2340.

[3] We reject the suggestion that direct review by the Supreme Court of the state court's competency proceedings suffices to sustain § 2244 against constitutional attack. Certiorari review does not amount to an adequate alternative form of collateral relief, *see Swain v. Pressley*, 430 U.S. 372, 381, 97

This question was not specifically answered in *Felker*. In *Felker*, the Court concluded that the "gatekeeping" system of the new Act, codified at 28 U.S.C. § 2244(b)(3), whereby a petitioner must obtain the permission of the court of appeals before filing a second or successive petition in the district court, "does not apply to our consideration of habeas petitions because it applies to applications 'filed in the district court.' " *Felker v. Turpin*, ___ U.S. ___, ___, 116 S.Ct. 2333, 2339, 135 L.Ed.2d 827 (1996). But the Court did not decide the question of whether it was bound by the restrictions imposed by §§ 2244(b)(1) and (2) – the subsections that specifically foreclose consideration of Martinez-Villareal's competency claim.

The Court did, however, provide us with signposts suggesting its future response to this question. First, the Court noted that "[w]hether or not we are bound by these restrictions [of §§ 2244(b)(1) and (2)], they certainly inform our consideration of original habeas petitions." *Id.*

Second, the Court's reason for concluding that it is *not* bound by § 2244(b)(3) strongly suggests that it *is* bound by §§ 2244(b)(1) and (2). Section 2244(b)(3) discusses petitions that are filed "in the district court." The Supreme Court inferred that Congress therefore did not intend for that subsection to apply to petitions filed in the

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S.Ct. 1224, 1229-30, 51 L.Ed.2d 411 (1977), because it is not collateral review at all. We recognize that this conclusion directly contradicts the Eleventh Circuit's decision in *In re Medina*, 109 F.3d 1556, 1564 (11th Cir.1997) ("review [of a competency claim] could be sought through certiorari review of the state court competency proceedings").

Supreme Court. Unlike § 2244(b)(3), §§ 2244(b)(1) and (2) do not contain limiting language and refer generally to all second or successive petitions. If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then §§ 2244(b)(1) and (2) should apply to the Supreme Court because they are not similarly limited.

Taken together, these signposts suggest that even the Supreme Court is bound by the new limitations on habeas review imposed by § 2244(b)(1) and (2).[4] If we are correct, then a state prisoner's competency claim can never be heard by any federal court.

The constitutional problem with this preclusion is patent. Indeed, the Supreme Court upheld the AEDPA's gatekeeping provisions against attack under the Suspension Clause because such provisions were a "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.' " *Felker*, ___ U.S. at ___, 116 S.Ct. at 2340. But the restrictions on successive petitions containing a colorable competency claim cannot be justified as a modified res judicata rule because res judicata cannot apply to a claim that will always be premature on a first petition.

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[4] We recognize that the Eleventh Circuit has reached the opposite result. We believe, however, that *In re Medina* is based upon a misreading of *Felker*. *Medina*'s conclusion that "the provisions of § 2244(b), as amended, do not restrict [the Supreme] Court's original habeas authority," 109 F.3d at 1564, ignores both the Court's statement that it is at least "informed" by §§ 2244(b)(1) and (2), as well as the literal distinction between § 2244(b)(3) and §§ 2244(b)(1) and (2).

We are left, then, with strong indications that under these narrow circumstances, the new statute poses a serious constitutional problem.[5]

IV.

We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of § 2244. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397-98, 99 L.Ed.2d 645 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1268 (9th Cir.1992).

In *In re Turner*, we concluded that "section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies." 101 F.3d 1323, 1323 (9th Cir.1996). The Second Circuit arrived at the same

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[5] *Greenawalt* did not resolve the constitutional question with which we are faced. The *Greenawalt* court rejected the petitioner's claim that § 2244 "forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence." 105 F.3d at 1277; *see also Medina*, 109 F.3d at 1565 (stating that the "plain terms" of § 2244(b)(2)(B) make it clear that "it has no application to claims that relate only to the sentence"). However, Greenawalt's sentencing claim was the type of claim that could be raised and addressed in a first petition. As we have explained, Martinez-Villareal's competency claim will never be addressed on its merits in a first petition.

conclusion in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir.1996). The *Camarano* court confronted the question of "whether a habeas petition qualifies as a 'second or successive' application within the meaning of § 2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies." *Camarano*, 98 F.3d at 46. The court concluded that "because application of the gatekeeping provisions [of § 2244] to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review. . . . a dismissal without prejudice can have no preclusive effect on subsequent petitions." *Id.* at 46-47; *see also Christy v. Horn*, 115 F.3d 201 (3d Cir.1997).

Turner and *Camarano* are founded upon exhaustion principles. Where a state prisoner has failed to exhaust state remedies, the federal habeas court may not grant his petition. 28 U.S.C. § 2254(b)(1). This rule obtains even where a habeas application contains both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982) ("A district court must dismiss habeas petitions containing both unexhausted and exhausted claims."). Where *Rose* applies, a petitioner must return to state court and litigate the unexhausted claims before presenting those claims in a new habeas petition to the federal court.

Rose aims to "protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203. But *Rose* also ensures that a petitioner's federal claims, once exhausted, will be subject to federal review

by demanding that a petition containing both exhausted and unexhausted claims be dismissed in its entirety.[6]

Turner and *Camarano* sustained the viability of this scheme by ensuring that once all claims had been properly exhausted in the state courts, the state prisoner would still be able to raise his federal claims in a federal forum. To accomplish this result, both courts held that the new statute's reference to "second or successive petition" does not encompass petitions that are filed after original applications were dismissed in their entirety for failure to exhaust state remedies.

We are faced with a different situation. *Rose* did not require the dismissal of Martinez-Villareal's first petition in its entirety because we determined that his competency claim was premature, rather than unexhausted. Unlike the cases of *Turner* and *Camarano*, we now address a situation in which there has been a federal decision on all but one of Martinez-Villareal's constitutional claims.

We conclude, however, that the rationale underlying *Turner* applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always

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[6] The *Rose* Court could have permitted a federal court to dismiss only a petitioner's unexhausted claims and entertain the exhausted ones on the merits. But the abuse of the writ doctrine probably would have precluded federal review of the remaining claims once those claims had been exhausted in state court and raised in a second petition. The *Rose* Court avoided this result by requiring dismissal of a mixed petition in its entirety.

be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as premature in order to ensure that such claims are likewise subject to federal review.

We believe that this result is justified by the fact that the normal procedural path contemplated by *Rose* and protected by *Turner* does not permit a federal court to consider a petitioner's competency claim. Let us suppose that we had dismissed Martinez-Villareal's first petition in its entirety pursuant to *Rose*. Let us also suppose that the State then issued a warrant of execution, thereby enabling Martinez-Villareal to exhaust his competency claim in state court. Finally, let us suppose that upon exhaustion of this claim, Martinez-Villareal brought a consolidated habeas petition to the federal courts containing all of his constitutional complaints, including his competency claim.

Under the rationale of *Rose* and the holding of *Turner*, we would construe this application as if it were Martinez-Villareal's first habeas petition. We would therefore be required to issue a stay of execution so that the federal

court could entertain (for the first time) his constitutional claims. The federal stay of execution, of course, would render his once-ripe competency claim premature, even though it has been exhausted in the state court. Thus, while this petition may be heard under *Rose* and *Turner*, the competency claim cannot be addressed until a second warrant of execution issues, the state court once again determines that the petitioner is competent, and the claim reappears before a federal court. Of course, at this point the federal court is precluded from reviewing the competency claim if it is deemed a "second or successive" petition barred by § 2244(b).

As the foregoing analysis indicates, application of *Rose* to a petition that includes a competency claim does not afford any opportunity for federal review. Moreover, to dismiss an entire first petition on the basis of an unexhausted competency claim ultimately will violate one of the animating purposes behind *Rose* and modern habeas jurisprudence. Under *Rose*, the state court must have the first opportunity to consider Martinez-Villareal's competency claim. But the state court's judgment will always be discarded as moot once the exhausted petition reaches the federal court and the mandatory stay issues. As a result, the state will always be required to begin again with the competency claim once the exhausted petition is adjudicated by the federal court, the premature competency claim is sent back to the state, and a new warrant of execution has issued. To say the least, this neither "protect[s] the state court's role in the enforcement of federal law," nor "prevent[s] disruption of state judicial proceedings." *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203.

We believe that our extension of *Turner* to a competency claim that was originally dismissed without prejudice as premature avoids both a probable constitutional problem and unwarranted disrespect of state judicial proceedings. Under our holding, a competency claim must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim – and only that claim – because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.[7]

Our holding is a narrow one that is inherently limited by the unique nature of a competency claim. Indeed, we can think of no other situation where a first petition

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[7] Indeed, we question whether the successive petition and abuse of the writ doctrines even apply to competency claims. As the Seventh Circuit recently noted, "[s]ection 2244(b) uses, but does not define, the phrase 'second or successive habeas corpus application.' " *Benton v. Washington*, 106 F.3d 162, 163 (7th Cir.1996). Due to its exceptional procedural posture, a petition raising only a competency claim might not be covered by this phrase. *See Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir.1995) ("Because *Ford* claims . . . concern the petitioner's immediate mental state, neither this court nor the Supreme Court has definitively decided whether relief would appropriately be denied on either abuse of the writ or successive petition grounds."); *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir.1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ.").

meets *Rose* 's exhaustion requirement but a claim raised by that petition must be tabled as premature. We extend *Turner* to this circumstance, and this circumstance only.

V.

Martinez-Villareal's competency claim is not subject to the restrictions imposed by § 2244(b). Therefore, we dismiss as unnecessary Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court. We transfer the petition presented to Judge D.W. Nelson on May 30, 1997 (Docket No. 97-80249), to the district court pursuant to 28 U.S.C. § 2241(b).[8]

T.G. NELSON, Circuit Judge, specially concurring:

In my view, the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims. It does so in an unambiguous fashion, by prohibiting the consideration of claims in second or successive petitions that do not fit the exceptions found in § 2244(b)(1) and (2). As we point out in the order, Martinez-Villareal's competency to be executed claim cannot come within the statutory exceptions.

In *Turner*, we "looked through" a prior petition that had been dismissed without action. Since the earlier petition had no practical or legal effect, it was appropriate to

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[8] Henceforth, a state prisoner in Martinez-Villareal's situation – that is, one who seeks to file a petition that contains *only* a competency to be executed claim where such claim previously had been dismissed as premature – may file such a petition directly with the district court.

simply ignore it. By contrast, the petition which was the subject of our prior opinion was perhaps Martinez-Villareal's third try at getting into federal court, and was extensively litigated by the parties, to the point of denial of *certiorari* by the Supreme Court. 80 F.3d 1301 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996). Thus, I don't believe *Turner* justifies our ignoring several years of litigation in the federal courts.

The law as it existed prior to the Act gave state prisoners the *opportunity* to present all their federal claims in federal court. They could lose the opportunity if they neglected to include a claim in a first petition. However, "old" § 2244(b) allowed the consideration of successive petitions containing "new grounds," if the "ends of justice" would be served. This opportunity was eliminated by the 1996 amendments to § 2244.

As we noted in our prior opinion, a petitioner could come to federal court with a "procedurally defaulted claim if the petitioner can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law." 80 F.3d at 1305. A showing of cause required the petitioner to demonstrate the existence of an objective factor external to the defense which hampered efforts to comply with the procedural rule. *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). The lack of ripeness of a claim of incompetence to be executed would appear to be a classic case of an external impediment to presentation of the claim.

Thus, on April 23, 1996, a claim involving lack of competency to be executed could be considered in a

successive petition filed in federal court. On April 24, 1996, and since, under the clear terms of § 2244, such claims simply cannot be considered by any federal court, in spite of the fact that there was no earlier opportunity to do so. If the writ has not been suspended as to those claims, it is difficult to see how it can ever be suspended as to any class of claims.

My conclusion that the writ has been suspended as to claims such as Martinez-Villareal's would require an analysis of the appropriate remedy to ensure that Martinez-Villareal could get to federal court. The remedy we order, the transfer to the district court of the petition filed here, is an appropriate one, and I fully concur in the result.

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(7)

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit held that limitations on second or successive habeas corpus petitions found in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) apply to all habeas proceedings (even "original" Supreme Court petitions), and that enforcing those limitations to preclude consideration of a claim of incompetency for execution would violate the Suspension Clause of the Constitution. To avoid such a constitutional problem, the Ninth Circuit construed competency for execution claims as being so unique that they are not subject to the AEDPA's limitations. Each of these conclusions contradicts a direct or implicit holding of *In re Medina*, 109 F.3d 1556 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997), as well as being subsequently rejected by *In re Davis*, 121 F.3d 952 (5th Cir.), *app. for stay and habeas corpus denied*, No. 97-5798 (1997). This circuit split raises the following questions:

1. Did Congress intend the AEDPA's limitations on second or successive habeas corpus petitions to apply to all claims and in every court, including competency for execution claims and applications for "original" Supreme Court habeas corpus writs?

2. Would applying the AEDPA to prevent consideration of a claim of incompetency for execution, which is raised in a second or successive habeas corpus petition, constitute a violation of the Suspension Clause?

3. By what means can this Court review these issues?

PARTIES TO THE PROCEEDINGS BELOW

This case stems from a habeas corpus proceeding in which Petitioners here, Terry L. Stewart (Director of the Arizona Department of Corrections) and Grant Woods (Attorney General of the State of Arizona) were the respondents. That proceeding was initiated by Ramon Martinez-Villareal, a prisoner in the custody of Petitioner Stewart under sentence of death. Relief is sought against an order issued by a panel of judges of the Ninth Circuit Court of Appeals comprised of Judges Edward Leavy, Dorothy W. Nelson, and Thomas G. Nelson.

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OPINION BELOW

The opinion staying Respondent's execution and ordering briefing of the relationship between the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Suspension Clause of the United States Constitution is published as *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). (J.A. at 170.) The opinion embodying the court of appeals' construction of the AEDPA to avoid the perceived Suspension Clause issue is published as *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). (J.A. at 179.)

STATEMENT OF JURISDICTION

Petitioners requested issuance of either a statutory writ of certiorari or an extraordinary writ (mandamus, prohibition, or common law writ of certiorari), to enable this Court to review the decision in *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). The Ninth Circuit issued its decision on June 23, 1997. Petitioners filed their petition on August 18, 1997, within the 90-day limit for a statutory writ of certiorari. Petitioners contend that this Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. §§ 1254(1) and 1651(a); and Supreme Court Rules 10 and 20.1. This Court granted a "writ of certiorari" on October 14, 1997, without specifying the form of certiorari contemplated. Details concerning jurisdiction are addressed in Argument III.

PROVISIONS INVOLVED

The Suspension Clause, Article I, Section 9, Clause 2, of the Constitution:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

28 U.S.C. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil

> or criminal case, before or after rendition of judgment or decree . . .

28 U.S.C. § 1651(a):

> The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2244 (as amended in 1996): See Appendix A reflecting changes effected by P.L. 104-132, Antiterrorism and Effective Death Penalty Act of 1996. A.R.S. §§ 13-4021 to -24. (*See* Appendix B, to Certiorari Petition.)

STATEMENT OF THE CASE

A. General Procedural History.

Ramon Martinez-Villareal (Respondent) was convicted of two murders and sentenced to death, based on two aggravating factors (depravity – he boasted to a traveling companion that he had killed the helpless victims merely to show how "manly" he was – and commission for pecuniary gain) that were not offset by any mitigation. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Beginning in 1986, Martinez-Villareal, represented by various attorneys, litigated several federal habeas corpus petitions and two state post-conviction ("Rule 32") petitions, obtaining stays of execution but no substantive relief in any of them. *Martinez-Villareal v. Arizona*, 493 U.S. 874 (1989) (denying certiorari in second Rule 32 proceeding). In 1990, the district court issued a stay of execution and appointed yet another attorney (Sean Bruner) to represent Martinez-Villareal. In 1991, Bruner suggested, for the first time, that Martinez-Villareal might be mentally incompetent to be executed, so the district court ordered the pending habeas petition dismissed without prejudice, allowing the matter to be litigated in the state courts.

The competency for execution claim, together with 30 other claims, was raised in a third state post-conviction relief

petition, but the trial court summarily denied relief, ruling that all but three of the claims were precluded, and that those three raised nothing on which relief could be granted. The competency for execution claim was denied because it should not have been brought in a Rule 32 proceeding at all, but under a separate statute specifically dealing with such claims, A.R.S. §§ 13-4021 to -24. (*See* Appendix B to certiorari petition.) The Arizona Supreme Court denied review and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 506 U.S. 893 (1992).

Bruner then filed an amended habeas corpus petition, arguing many of the claims presented in the Rule 32 proceeding. The district court rejected most of them, but ordered that Martinez-Villareal be resentenced, on the theory that he had received ineffective representation during the original sentencing. The district court left unresolved the issue of Martinez-Villareal's competency to be executed, holding that the claim was not "ripe" for decision – there was then no warrant for his execution and the claim had not been exhausted in the state courts, because no proceeding had ever been brought under the state's competency statute. On appeal, the Ninth Circuit vacated the resentencing order so that Martinez-Villareal was not granted relief of any kind. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). Left unresolved was the competency issue, which the court found had been brought to the federal courts "premature[ly]"; it specified that its order "to enter judgment denying the petition [was] not intended to affect any later litigation of that question." 80 F.3d at 1307 and 1309 n.1.

In early 1997, the defense finally filed a motion under the statute dealing with competency for execution, requesting a hearing. The Arizona Supreme Court issued an execution warrant for April 16, 1997, but reset the execution to May 21, 1997, to allow Martinez-Villareal more time to prepare for the hearing. (J.A. at 27.) Having heard four days of testimony, the trial judge concluded that, "Defendant is aware that he is to be punished for the crime of murder and [ ] he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villareal is therefore competent

to be executed under the laws of the State of Arizona." (J.A. at 48.) On May 16, 1997, the Arizona Supreme Court unanimously agreed that Martinez-Villareal is competent for execution and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 117 S. Ct. 1840 (1997).

B. Development of the Successive Petition/Suspension Clause Issue.

On May 14, 1997, the Federal Public Defender's Office filed a motion requesting that the district court appoint experts to examine and test Martinez-Villareal, in anticipation of filing a "supplemented" habeas petition presenting the competency for execution issue. (J.A. at 30.) Petitioners argued that Martinez-Villareal was in effect initiating a successive petition, but that the permission from the court of appeals required by 28 U.S.C. § 2244(b)(3)(A), as amended by the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), had not been obtained, so that the district court lacked authority to grant the relief requested. (J.A. at 65.) On May 16, 1997, the district court agreed with Petitioners and denied Martinez-Villareal's request (J.A. at 101), and he appealed. Although it denied all other relief, the Ninth Circuit ordered that the execution be stayed and that further briefing be submitted concerning whether the AEDPA's limitations on successive petitions, as applied to competency for execution claims, amounted to an unconstitutional suspension of the writ of habeas corpus. *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). (J.A. at 170.)

Following oral argument, the Ninth Circuit issued the opinion which is the subject of this case. *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). (J.A. at 179.) Citing *Herrera v. Collins*, 506 U.S. 390, 406 (1993), the majority opinion stated that claims of incompetency for execution, which were first recognized as possessing a constitutional basis in *Ford v. Wainwright*, 477 U.S. 399 (1986), were to be "properly considered in proximity to the execution." 118 F.3d at 630. Hence, when Martinez-Villareal first raised his competency claim in federal court, no execution warrant was

operative, so the claim had not been addressed because of its prematurity. *Id.* However, the majority believed that, even if there had been an execution warrant pending at the time that Martinez-Villareal first raised the competency claim in federal court, it would still have been premature, because of the statement in *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1297 (1996), that, "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Thus, because a stay would necessarily have issued to permit federal court consideration of the rest of Martinez-Villareal's claims, and that stay would automatically have rendered the execution non-imminent, the competency claim would still have been premature and not open to consideration in the first habeas proceeding. *Id.*

The situation is further complicated by the passage of the AEDPA. The majority below recognized that 28 U.S.C. § 2244, as amended, divides successive habeas petitions into just two categories: those raising claims that were presented in a previous petition, and those raising claims that were not presented in a previous petition. Those in the first category are required, without exception, to be dismissed, while those in the second category will also be dismissed, unless they can pass through the narrow "gateway" exceptions permitted by § 2244(b)(2). *Id.* at 630-31. The first exception, subsection 2244(b)(2)(A), for claims relying on a new rule of constitutional law that was unavailable at the time of the applicant's first habeas petition, does not apply to Martinez-Villareal's competency for execution claim, because such claims have been available since *Ford v. Wainwright* was decided in 1986. *Id.* at 631. The second exception, subsection 2244(b)(2)(B)(i) and (ii), involving newly discovered facts, also is unavailable in a situation like this one, because of the requirement that the new evidence be such as would establish that no reasonable factfinder "would have found the applicant guilty of the underlying offense." This limitation excludes all claims – including competency for execution – that raise only sentencing matters. *Id.; see also Greenawalt v. Stewart*, 105 F.3d

1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997); *In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir.), *cert. denied*, 117 S. Ct. 1331 (1997); *In re Davis*, 121 F.3d 952, 955 (5th Cir. 1997) (concession by petitioner under death sentence that claim of incompetency for execution not cognizable under this exception). "It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed." *Martinez-Villareal v. Stewart*, 118 F.3d at 631.

The court of appeals believed that this situation created a "predicament" of constitutional proportions, in that the preclusion of habeas corpus review might amount to a violation of the Suspension Clause, United States Constitution, Article I, Section 9, Clause 2. *Id.* The majority opinion rejected the possibility of certiorari review by this Court as an adequate solution to the perceived problem because that is part of the direct review process, rather than a mode of plenary collateral review. *Id.* at 631 and n.3. It also found no solution in this Court's authority to issue "original" writs of habeas corpus because, contrary to the Eleventh Circuit's conclusion in *Medina*, 109 F.3d at 1564, it concluded that § 2244(b)'s restrictions on successive petitions apply to petitions initiated in this Court, as well as in the lower courts. *Id.* at 631-32. To avoid the hypothesized "difficult constitutional question," the majority below effectively rewrote the AEDPA, determining that, henceforth, competency for execution claims will constitute a new category of successive claims, which will be *required* to be brought in multiple habeas petitions, but which, nonetheless, will not be precluded as successive, on the theory that bringing them initially when they are "premature" is the same as not having brought any cognizable prior petition at all. *Id.* at 632-34. Utilizing this transmogrified view of a "successive" petition, the majority deemed the requirement that a court of appeals grant or deny permission for the filing of a successive petition to be completely inapplicable to competency for execution claims, so it simply transferred Martinez-Villareal's second habeas petition to the district court for further proceedings. *Id.* at 634-35. The third

member of the court below believed that the Suspension Clause issue could not be avoided in this manner, and that the AEDPA's restrictions on habeas review as applied to competency for execution claims violate the Suspension Clause. However, he concurred in the result, considering the transfer of the competency claim to the district court a satisfactory resolution. *Id.* at 635.

SUMMARY OF ARGUMENT

The court of appeals' analysis of the case depends in part upon the Act's restrictions on successive petitions applying to "original" petitions for habeas corpus filed in this Court; if the restrictions do not apply, then Respondent obviously still has that habeas remedy available to him, and there can be no Suspension Clause problem. Although the matter was discussed in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 2337-39 (1996), the Court's statement, "Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions," left some doubt about the matter. Petitioners contend that the AEDPA's restrictions on successive petitions *do* apply to petitions filed in this Court. This Court has recognized throughout its history that the authority of all the federal courts to issue habeas writs, itself included, is granted by statute. *Id.* at 2338 and n.1, and 2340 (tracing current 28 U.S.C. § 2241 back to the Judiciary Act of 1789 and citing *Ex parte Bollman*, 4 Cranch 75, 94 (1807)). Since the source of this Court's authority is identical to the source of authority for the lower federal courts, it necessarily follows that this Court is likewise "bound" by the restrictions on that authority enacted by the AEDPA. Hence, the Suspension Clause issue cannot be avoided through use of "original" petitions to this Court.

The real question, therefore, is what the Suspension Clause (which contains no internal definitions) actually protects. The language of the Clause, the manner of its passage, and the precedents of this Court (beginning with *Bollman*) make clear that the Clause was not intended to create a substantive new right, but only to protect from Congressional

suspension a right that already existed, which was defined by the English common law (particularly as regularized by the English Habeas Corpus Act of 1679). Those English sources, thoroughly familiar to the Framers, and largely incorporated into the writ-authorizing Section 14 of the Judiciary Act of 1789, were designed to protect against arbitrary imprisonment without trial, *not* to provide quasi appellate review of criminal cases after conviction. Moreover, the Judiciary Act of 1789 (passed by the First Congress, which contained many of the members of the Constitutional Convention), by its very terms, excluded from the privilege persons under *state* custody. Thus, the Framers plainly intended the Suspension Clause only to protect the privilege as it existed at common law, so that no constitutional protection was afforded to persons already under conviction, and particularly not state prisoners.

Although the federal habeas writ has subsequently been extended to apply to persons after conviction, including state inmates, those extensions all rest on Congressional enactments, particularly the Judiciary Act of 1867. This Court has never held that a Congressional restriction on the use of habeas transgressed the Suspension Clause. It follows that what Congress has bestowed, Congress is constitutionally permitted to regulate and restrict. Where Congress determines to withdraw habeas jurisdiction, applicants have no constitutional basis for complaint, regardless of what their subjective expectations of relief may have been. *See, e.g., Ex parte McCardle*, 7 Wall. 506 (1868) (acknowledging loss of jurisdiction over habeas appeal, even after it had been argued and submitted for decision, because of revocation of authorizing statute). Therefore, that Martinez-Villareal anticipated being able to litigate his competency claim by returning to the district court when that claim had become ripe, but his expectation will be thwarted by the intervening enactment of the restrictions on successive petitions, does not demonstrate that the Suspension Clause will be violated. And since there is no constitutional violation to avoid, the court of appeals' disembowelment by "construction" of the AEDPA is error not to be tolerated.

The appropriate jurisdictional basis for the Court to hear this matter is complicated by an AEDPA provision, 28 U.S.C. § 2244(b)(3)(E), which states that courts of appeals' grants or denials of authorization to file successive habeas petitions shall not be the subject of petitions for rehearing or certiorari. However, since in this case the Ninth Circuit purported *not* to be granting or denying permission to file a successive petition, but rather, were construing the Act so as to exclude Martinez-Villareal's petition from even being considered "successive," Petitioners should be deemed entitled to come before the Court by means of ordinary, statutory certiorari. However, if the statutory preclusion on review by certiorari is deemed applicable here, it is certain that this case presents appropriate grounds for consideration pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g., De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945). Hence, though it remains for the Court to determine which basis is most appropriate, it is certain that the case is properly before it.

The Court should therefore hold: that this case is properly before it; that the AEDPA restrictions on successive habeas corpus petitions apply to original petitions filed in this Court; and that those restrictions do not violate the Suspension Clause, thus the court of appeals' opinion "construing" the Act was erroneous. This Court should then vacate the order transferring Martinez-Villareal's petition to the district court for further action, and deny his request for permission to file a successive petition.

ARGUMENT

I

THE AEDPA'S RESTRICTIONS ON SUCCESSIVE HABEAS CORPUS PETITIONS APPLY TO ALL KINDS OF CLAIMS AND TO ALL COURTS.

The Ninth Circuit concluded that, if 28 U.S.C. § 2244(b)'s restrictions on second or successive habeas petitions (hereafter referred to as "successive petitions") apply to

Martinez-Villareal's claim of incompetency for execution, it would constitute a violation of the Suspension Clause, so it "construed" the AEDPA to avoid the perceived constitutional problem. 118 F.3d at 631-34. This reconstruction of the statute can be justified only if the AEDPA's restrictions apply to competency for execution claims, and to "original" habeas corpus petitions brought in this Court; otherwise, Martinez-Villareal suffers from no "predicament" which needs to be resolved, and the judicial redrafting of the statute is patently erroneous. The Ninth Circuit recognized that its view that the restrictions on successive habeas corpus petitions apply to "original" habeas petitions in this Court directly contradicts the conclusion of the Eleventh Circuit in *In re Medina*, 109 F.3d at 1564. *Id.* at 631-32 and n.4; *see also In re Davis*, 121 F.3d 952, 956 (5th Cir.), *app. for stay and pet. for habeas corpus denied*, No. 97-5798 (1997).

A. Changes Effected By the Amendments Concerning Successive Petitions.

What Congress did with regard to successive habeas petitions can most clearly be understood by examining the version of 28 U.S.C. §§ 2244 and 2255 provided in Appendix A, which shows by strikeouts and italics the language removed and added by the AEDPA. Subsection (a) of § 2244 continues to voice the principle that federal judges should not entertain repetitive petitions from federal prisoners, but it is significantly tightened in that refusal of a successive petition is now required, even if previously unpresented or undetermined grounds are being raised, unless the narrow exceptions included in § 2255 (as amended) are satisfied. Moreover, the discretion previously possessed to evaluate whether the "ends of justice" would be served by consideration of a successive petition has been removed.

Former subsection (b) of § 2244 has been completely expunged. Before the amendment, the statute provided that a successive petition "need not" be entertained, which permitted some discretion in determining whether to consider such petitions. That discretion is no longer available. Previously

the subsection also indicated that successive petitions should be accepted, if they were based on "factual or other" grounds not adjudicated in the first proceeding, so long as the judge was satisfied that there had not been deliberate withholding of the newly asserted ground or other (undefined) abuse of the writ. This language, which had been reiterated as Rule 9(b) of the Habeas Corpus Rules, also is gone.

Substituted is a completely new subsection (b), which divides the universe of successive petitions into just two categories. Under (b)(1), any claim that *was* presented in a prior petition "shall be dismissed" – regardless of how it was dealt with in the prior proceeding. Under (b)(2), any claim that *was not* presented in the prior petition shall also be dismissed, unless: (A) it relies on a new rule of constitutional law made retroactively applicable by the Supreme Court, or (B) it relies on new facts which could not have been discovered previously *and* is such that the habeas applicant would not have been found guilty. Conspicuously absent is allowance for relief in a successive petition on any ground which is related to the sentence imposed rather than actual innocence. Moreover, the district courts are forbidden by new subsection (b)(3) even to consider successive petitions unless permission has been granted by the court of appeals. In short, § 2244 as amended is not even a ghost of its former self, but rather, is a completely new creature.

The amended version of § 2244(b) specifically requires that the petition that Martinez-Villareal now wishes to litigate be treated as a successive petition. The statute permits no inquiry into the applicant's subjective state of mind ("deliberately withheld"), while the whole amorphous concept of "other abuse of the writ" has been replaced by clear and simple categorization of types of successive claims (previously presented or not previously presented), all of which are precluded, absent demonstration of one of the two narrow, objectively ascertainable exceptions. The "ends of justice" language in § 2244(a), which this Court continued to use as a basis for decisions concerning successive petitions by *state* prisoners even after Congress deleted it from § 2244(b) in the 1966 revision of the habeas statutes, *Kuhlman v. Wilson*, 477

U.S. 436, 448-52 (1986), has been completely removed; thus, "the permissive language of § 2244(b) giv[ing] federal courts discretion to entertain successive petitions under some circumstances" (477 U.S. at 451) no longer exists.

In short, after watching the courts struggle for three decades with the vague contours of "ends of justice" and "abuse of the writ," Congress cut completely through the jurisprudential Gordian knot, abolishing those nebulous concepts and replacing them with the sharply-defined categories and exceptions discussed above, in a manner which brooks no reasonable question about its intent to make the first habeas petition the "one bite at the apple" available, and to make acceptable successive petitions extremely rare. Since Martinez-Villareal undeniably has already had one fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.

B. The AEDPA's Restrictions on Successive Petitions Apply to Competency for Execution Claims.

There seems to be no dispute that the restrictions on successive petitions in 28 U.S.C. § 2244(b) apply to competency for execution claims. Nothing in the language of the statute or its legislative history indicates Congressional intent to exempt any particular category of claims from the universal language restricting successive petitions, and the three courts that have considered the matter all agree that these restrictions apply to competency for execution claims. *Medina*, 109 F.3d at 1564-65; *Davis*, 121 F.3d at 954; *Martinez-Villareal*, 118 F.3d at 630-31.

C. The AEDPA's Restrictions on Successive Petitions Apply to "Original" Habeas Corpus Petitions In This Court.

As previously noted, the circuits diverge regarding the *results* of applying the restrictions to competency for execution claims. The Eleventh and Fifth Circuits saw no problem in precluding district court habeas consideration, because of their view that an inmate can obtain adequate federal review

by means of a certiorari petition or an unrestricted original habeas corpus petition to this Court. *Medina*, 109 F.3d at 1564; *Davis*, 121 F.3d at 956. The Ninth Circuit, by contrast, sees the AEDPA's restrictions on successive habeas petitions as applying even to original petitions to this Court, and certiorari from the state court proceeding as inadequate, because it is not a form of plenary collateral review. *Martinez-Villareal*, 118 F.3d at 631-32 and nn.3, 4. This perceived lack of adequate federal court collateral review motivated it to reconstruct the statute, to avoid the supposed Suspension Clause issue. *Id.* at 632-34. Hence, to determine whether the manipulation of the statute is warranted, this Court must first decide whether its "original" writs of habeas corpus are subject to the AEDPA's restrictions on successive petitions.

This question was touched upon, but not decided, in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996). The time has come to resolve it, and Petitioners contend that the AEDPA's restrictions *do* apply to such original petitions.[1]

This Court has agreed since the time of Chief Justice Marshall that "power to award the writ by any of the courts of the United States must be given by written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807), quoted approvingly in *Felker*, 116 S. Ct. at 2340. The statutory authority known to him, Section 14 of the Judiciary Act of 1789, "is the direct ancestor of 28 U.S.C. § 2241," the single source from which all federal courts derive their authority to issue writs of habeas corpus. *Felker*, 116 S. Ct. at 2338 and n.1. Indeed, the first issue considered in *Felker* was stated to be the extent to which the provisions of the AEDPA "apply to petitions for habeas corpus filed *as original matters in this Court pursuant to 28 U.S.C. §§ 2241 and 2254.*" *Id.* at 2337 (emphasis added). The conclusion was that the AEDPA did not repeal the Court's "authority to entertain a petition for habeas

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[1] Petitioners' position below (relying upon *Medina)* was that the restrictions do not apply to this Court. Reconsideration of the matter in light of the Ninth Circuit's analysis has persuaded Petitioners that the restrictions of the AEDPA do apply to original petitions filed with this Court.

corpus" – "As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication [by the Act of 1867], we decline to find a similar repeal of § 2241 of Title 28 – its descendant, n.1, *supra* – by implication now." *Id.* at 2339. Chief Justice Rehnquist has referred, collectively, to "the statutes governing habeas corpus, 28 U.S.C. § 2241-2255." *Lonchar v. Thomas*, ___ U.S. ___ , 116 S. Ct. 1293, 1304 (1996) (concurring opinion). Similarly, *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2063 (1997), refers to the AEDPA as "amend[ing] § 2244 and §§ 2253-55 of chapter 153 . . . governing *all habeas corpus proceedings in the federal courts*." (Emphasis added.) Many of the individual sections within Chapter 153 specifically refer to both this Court (or its individual justices) and the lower federal courts, without drawing any distinction between them, except as required by their relative positions. See 28 U.S.C. §§ 2241(a) and (b), 2242, 2243, 2251, and 2254(a). Conspicuously absent is any differentiation between the standards and procedures to be employed by this Court and the lower federal courts. Indeed, Supreme Court Rule 20.4 expressly incorporates the requirements of §§ 2241, 2242, and 2254, all of which (apart from limited express exceptions) govern habeas petitions in the lower courts. Thus, since the source of authority for this Court to issue original writs is identical to the source of the grant to the lower courts, it necessarily follows that this Court is subject to the same restrictions imposed on those courts, absent a clear Congressional intent to the contrary.

No such intent to exempt petitions filed in this Court is found in the AEDPA. On the contrary, the language of the amendments demonstrates that they were intended to apply to *all* habeas proceedings, including those originating in this Court. As noted in *Felker*, the "gatekeeping" provision codified as § 2244(b)(3) obviously cannot apply to this Court, because it is specifically directed at applications "filed in the district court." 116 S. Ct. at 2339. "If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then §§ 2241(b)(1) and (2) should apply to the Supreme Court because they are not

similarly limited." *Martinez-Villareal*, 118 F.3d at 632. This is essentially the mode of analysis applied by the Court to other portions of this same legislation in *Lindh v. Murphy*: the explicit provision for retroactive application of Chapter 154 implicitly indicated that Chapter 153 was *not* intended by Congress to apply to pending cases. 117 S. Ct. at 2063. By parity of reasoning, the express limitation on the applicability of § 2244(b)(3) to district court proceedings implies that § 2244(b)(1) and (2) are not to be so limited, and therefore apply to habeas proceedings initiated in this Court.

Felker is not to the contrary, despite the misunderstanding of this point evinced by the Eleventh Circuit in *Medina* (109 F.3d at 1564) and followed by the Fifth Circuit in *Davis* (121 F.3d at 956). The *Felker* opinion carefully distinguished between the issues of whether the AEDPA "deprived" this Court of jurisdiction even to "entertain" original habeas petitions, and whether the AEDPA imposed conditions or limitations on the ability to grant relief on original petitions when they were being "entertained." 116 S. Ct. 2337. The point of *Felker*'s discussion of *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), was that the repeal of this Court's jurisdiction to entertain original habeas petitions cannot be done *by implication*. While Congress can constitutionally revoke parts of this Court's appellate jurisdiction (as was permissibly done in the 1868 withdrawal of this Court's authority to hear appeals from the circuit courts, and in the AEDPA's withdrawal of certiorari jurisdiction concerning circuit court judgments on applications to file successive petitions), it must be explicit, and the AEDPA contains no such clear revocation of this Court's jurisdiction to receive "original" habeas petitions. Thus, such jurisdiction to entertain original habeas petitions still exists. 116 S. Ct. at 2338-39.

However, the "requirements a state prisoner must satisfy to show he is entitled to a writ of habeas corpus from this Court" is a matter logically distinct from whether the Court possesses jurisdiction to hear him at all, and hence was dealt with in a discrete portion of the *Felker* opinion, Part II(B). *Id.* at 2339. This is where the ambiguity appears because, after discussing the restrictions contained in § 2244(b)(1) and (2),

this Court states that, "Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas corpus petitions." *Id.* This isolated statement cannot carry the weight apparently given it by the Eleventh Circuit in *Medina*, which confidently asserts that, "the provisions of § 2244(b), as amended, do not restrict that Court's original habeas authority." 109 F.3d at 1564 (citing generally to "*Felker*, 116 S. Ct. at 2338-39").

This Court's discussions preceding and following the ambiguous remark seem to indicate that the § 2244(b)(1) and (2) restrictions on successive petitions are constitutional, and that in appropriate cases this Court *will* be "bound" by them. "[A]lthough *the Act does impose new conditions on our authority to grant relief*, it does not deprive this Court of *jurisdiction* to entertain original habeas petitions." 116 S. Ct. at 2337 (emphasis added). Part II(B), which specifically deals with this issue, refers to the AEDPA affecting "*requirements* a state prisoner *must* satisfy" to obtain relief here. *Id.* at 2339 (emphasis added).

> Title I of the Act has changed the standards *governing our consideration of habeas petitions* by *imposing new requirements* for the granting of relief to state prisoners. *Our authority* to grant habeas relief to state prisoners *is limited by § 2254*, which specifies the conditions under which such relief may be granted to "a person in custody pursuant to the judgment of a State court."

Id. (emphasis added). Then, after noting that while the restriction in § 2244(b)(3) applies only to petitions filed in the district courts, there is no such limitation in § 2244(b)(1) and (2); "These restrictions *apply without any qualification to any 'second or successive habeas corpus application under section 2254.'*" *Id.* (emphasis added). Later, in discussing the Suspension Clause issue, it is noted that the Act "further restricts the availability of relief" beyond the pre-existing limitations, but that "the power to award the writ by *any* of the courts of the United States must be given by written law" (quoting *Bollman*), so that judgments about the proper scope

of the writ are for Congress to make, and the "added restrictions which the Act places on second habeas petitions" are constitutional. *Id.* at 2340 (emphasis added).

The reasonable conclusion from these statements seems to be that the Court was signalling that it is "bound" by § 2244(b)(1) and (2). The opinion for the Court states that, "Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court," so that they neither satisfied the AEDPA nor the prior "exceptional circumstances" requirement of Supreme Court Rule 20.4(a). *Id.* at 2341. Similarly, Justice Stevens' concurring opinion emphasized that the original writ was being properly denied because "petitioner's claims do not satisfy the requirements of our pre-Act jurisprudence or the requirements of the Act . . . ," and Justice Souter's concurrence says that, "even applying the traditional criteria, we would choose to deny" Felker's petition. *Id.*

Thus, the Court was unanimous that Felker's petition would have been denied even under its pre-AEDPA standards, a conclusion which obviated any need to expatiate upon the new, more restrictive standards. In any event, the statement, "Whether or not we are bound by these restrictions" (*Felker*, 116 S. Ct. at 2339), is at most language of reservation, not language of determination. *Felker* cannot be understood as holding that this Court is exempt from the AEDPA's restrictions on successive petitions. For all the reasons previously presented, the Court should now affirmatively acknowledge that it is indeed "bound" by the restrictions of § 2244(b)(1) and (2) in ruling upon "original" habeas corpus petitions submitted to it, and proceed to deal with the corollary question, the constitutionality of those restrictions under the Suspension Clause.[2]

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[2] Of course, should this Court nonetheless rule that the AEDPA's restrictions on successive petitions do *not* apply to original petitions filed with it, then the Suspension Clause issue disappears even under the Ninth Circuit's analysis, and Martinez-Villareal is ineligible for district court consideration of his claim.

II

THE SUSPENSION CLAUSE IS NOT VIOLATED BY THE AEDPA'S RESTRICTIONS ON SUCCESSIVE PETITIONS, SO THE NINTH CIRCUIT ERRED IN RECONSTRUCTING THE STATUTE TO AVOID THE NONEXISTENT VIOLATION.

The premise underlying the court of appeals' handling of this case, though expressed only obliquely, is nonetheless quite clear: it believes that every state convict *always* has a right to have at least one *federal court* conduct *plenary collateral review* of his constitutionally-based claims. Thus, having determined that the AEDPA's restrictions on successive petitions apply to original habeas proceedings in this Court, it looked for alternative modes of plenary federal collateral review, but it deemed a certiorari petition from the state competency proceeding not "an adequate alternative form of collateral relief." *Martinez-Villareal*, 118 F.3d at 631-32 and n.3.[3]

Because the perceived foreclosure of habeas was considered likely to constitute a Suspension Clause violation, and because the court below believed that it had "to ensure that a petitioner's federal claims are accorded one hearing in federal court," the majority held that a successive competency for execution claim should be treated as not successive, to avoid triggering the AEDPA's restrictions. *Id.* at 632-34 (discussing *In re Turner*, 101 F.3d 1323 (9th Cir. 1996)). The concurring judge did not believe *Turner* could be stretched to cover the very different facts of this case (in which there had been years of litigation, conclusively resolving dozens of other claims),

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[3] This led to the erroneous hyperboles that "the inapplicable gateways provided by the AEDPA foreclose *any* federal review of a death row inmate's competency to be executed," and, "If we are correct, then a state prisoner's competency claim can *never* be heard by *any* federal court." 118 F.3d at 631, 632; emphasis added. The statements are patently incorrect because such claims *can* be heard, in this Court, by certiorari. Indeed, Martinez-Villareal exercised that right, in No. 96-9068, *cert. denied*, 117 S. Ct. 1840 (1997).

but agreed that inmates' loss of "opportunity to present all their federal claims in federal court" by means of habeas because of the restrictions on successive petitions, constituted a Suspension Clause violation. *Id.* at 635. Thus, all three judges below agreed that applying the restrictions on successive petitions to competency for execution claims likely would be unconstitutional, necessitating some remedy.

Petitioners believe this reasoning is flawed: unless there really is a constitutional entitlement to federal *collateral* review of *all* federal claims arising out of state criminal proceedings, precluding consideration of Martinez-Villareal's competency claim presented in a successive petition deprives him of no legal right and requires no remedy. The only source posited by either Martinez-Villareal or the court of appeals for such an entitlement is the Suspension Clause. As shown below, the Suspension Clause is not violated by applying the AEDPA here, so Martinez-Villareal's petition should have been held precluded, not transferred to the district court.

A. *Felker* Determined That The AEDPA Restrictions Do Not Constitute A Suspension Clause Violation.

Though the Ninth Circuit obviously did not perceive it that way, it appears that the Suspension Clause issue was resolved in *Felker*. Part III of that opinion considered "whether the Act suspends the writ of habeas corpus in violation of Article I, § 9, clause 2 of the Constitution." 116 S. Ct. at 2339. The Court first briefly summarized the expansion of habeas corpus through statutory amendment and Court interpretation, the result being that, "The writ of habeas corpus known to the Framers was quite different from that which exists today." *Id.* at 2339-40. Next, it noted the new requirement for obtaining permission to file a successive petition, but found this constitutionally insignificant, because it merely transferred to the court of appeals a screening function previously performed by the district courts under Habeas Corpus Rule 9(b). *Id.* at 2340. Then, applicable to this case:

> The Act also codifies some of the pre-existing limits on successive petitions *and further restricts the availability of relief* to habeas petitioners. . . .
>
> The *new restrictions on successive petitions* constitute a *modified* res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), we said that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.*, at 489, 111 S. Ct. at 1467. The *added restrictions which the Act places on second habeas petitions* are well within the compass of this evolutionary process, and we hold that *they do not amount to a "suspension" of the writ contrary to Article I, § 9.*

Id. (emphasis added; some citations omitted).

This recognizes that the AEDPA places *additional* restrictions on successive petitions, above and beyond the pre-existing (judicial) limitations which it codifies, and holds that those *additional* restrictions do not violate the Suspension Clause. Those additional restrictions obviously include § 2244(b)(1) and (2), because they were among the Act's "new requirements for granting relief," which had just been considered in Part II(B). *Id.* at 2339. Hence, it appears that *Felker* answered the Suspension Clause question. However, should the Court feel that the issue needs examination beyond that given to it in *Felker*, further discussion is provided, demonstrating that *Felker*'s conclusion was correct.

B. There Has Been No Suspension Clause Violation Because What the Clause Protects is Not Modern Statutory Habeas Corpus.

1. *What is the relevant point in time*?

To determine whether the Suspension Clause has been violated, it is necessary to know what is protected by the

Clause. The court of appeals assumed that the Clause safeguards the writ of habeas corpus as it exists today, rather than what existed in 1789, because such an assumption was mentioned in *Felker*, 116 S. Ct. at 2340. 118 F.3d at 631 n.2. Though understandable, this was a fatal error in the court of appeals' analysis, because of the fundamentally different results which follow from employing the assumption in this case and in *Felker*. In *Felker* the assumption was made with juridical safety because it could not affect the outcome: since *Felker* held that even the expansive modern writ had not been suspended, the timing issue was irrelevant. Here, by contrast, the assumption is outcome-determinative: by assuming that the privilege of habeas corpus is driven by a one-way, expansive, historical ratchet, the court of appeals necessarily concluded that the AEDPA's mandate to restrict the availability of habeas relief constituted a "suspension." In short, utilizing the assumption as the court of appeals did is judicial question-begging.

This Court plainly did not intend its statement in *Felker* to be the resolution of the timing issue. Not only is the assumption plainly stated to be such, but its conditionality is emphasized by the added phrase, "for purposes of decision here." Moreover, rather than just citing *Swain v. Pressley*, 430 U.S. 372 (1977), which also found it unnecessary to decide whether it was the old writ or the modern, expanded, writ which is protected by the Suspension Clause, *Felker* cited Chief Justice Burger's concurring opinion in *Swain*, 430 U.S. at 385, which expressly adopted the view that, "The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted," instead of the writ as it has been statutorily expanded and interpreted by this Court. The additional citation reiterates that the timing question is, at most, still open, while simultaneously suggesting that when the question is

squarely put, it will be only the 1789 form of the writ which will be found protected by the Clause.[4]

This is consistent with other indications of acceptance of Chief Justice Burger's view. In response to a claim that the Suspension Clause was violated by a statute limiting availability of transcripts in federal collateral relief proceedings, this Court said:

> This argument presupposes, *inter alia*, that a right to a free transcript is a necessary concomitant of the writ which the Founders declared could not be suspended. This is obviously not the case. The writ of habeas corpus operated until 1944 with no provision for free transcripts for indigents. Congress, when in that year it authorized free transcripts for the first time, could certainly have limited the authorization to nonfrivolous cases where a need had been shown. If Congress could have thus limited the writ directly without "suspending" it, it follows that it may do so indirectly.

United States v. MacCollom, 426 U.S. 317, 322-23 (1976) (plurality opinion).

Agreeing with the view expressed by the *MacCollum* plurality, that the operative date for Suspension Clause analysis is 1789, is an impressive array of other authorities. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 252-56 (1973) (Powell, J., concurring); *United States v. Anselmi*, 207 F.2d 312, 314 (3d Cir.), *cert. denied*, 345 U.S. 947 (1953); *Kansola v. Civiletti*, 630 F.2d 472, 474 (6th Cir. 1980), *cert. denied*, 450 U.S. 930 (1981); *Lindh v. Murphy*, 96 F.3d 856, 867-68 (7th Cir. 1996), *rev'd on other grounds*, 117 S. Ct. 2059 (1997); *Jones v. Squier*, 195 F.2d 179, 181 (9th Cir. 1952); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1966); Rex

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[4] When an issue has only been assumed in prior cases, the Court is completely free to address the matter on its merits when it is squarely presented. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993), *citing Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 Cal. L. Rev. 335 (1952) (hereafter "Collings"); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."). This means that the parameters of the constitutionally-protected writ are quite narrow, and the arena in which Congress is free to expand or contract availability of the statutory writ is very broad – a breadth clearly capable of encompassing the changes effected by the AEDPA.

2. *What is actually protected by the Suspension Clause?*

The Suspension Clause provides that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Since no definition is provided for the critical terms, it must be assumed that the Framers were utilizing terms which already possessed a commonly recognized fund of meaning. As Chief Justice Taft explained:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Ex parte Grossman, 267 U.S. 87, 108-09 (1925). Chief Justice Marshall examined the English common law to determine the meaning of habeas corpus as used in the Suspension Clause and in Section 14 of the concurrently passed Judiciary Act of 1789, 1 Stat. 82. *Ex parte Bollman*, 4 Cranch at 94-99. "In the early decades of our new federal system, English common law defined the substantive scope of the writ." *McCleskey v. Zant*, 499 U.S. 467, 478 (1991) (citing *Ex parte Watkins*, 3 Pet. 193, 201-03, 7 L. Ed. 650 (1830)). Therefore, to understand what the "habeas corpus" is that is being protected by the Clause, it is critical to understand that common-law background.

(a) English background of the writ and its suspension. There were, in fact, a whole group of writs, all referred to as "habeas corpus," which had been carefully parsed by Blackstone. *Bollman*, 4 Cranch at 97-98. Over time, the writ *cum causa* (or *ad subjiciendum*) emerged as the chief instrument by which a person had his body and cause removed from a lower to a higher court, for the purpose of inquiry into the cause of his restraint, and it was this which was celebrated by Blackstone as the "Great Writ." Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. Chi. L. Rev. 243, 243-44 and nn. 3, 4 (1965) (hereafter "*States*"). This was the writ contemplated by both the Suspension Clause and the Judiciary Act of 1789. *Bollman*, 4 Cranch at 94-95; *Carbo v. United States*, 364 U.S. 611, 614-15 (1961).

In England the judicially developed writ had been defined and regulated by the "famous" Habeas Corpus Act of 1679, 31 Car. II, c.2. Collings at 337. Particularly significant is the fact that, "Persons 'convict or in execution' were excluded altogether from the benefits of the Act [of 1679]." *Id.* at 337 n.9. "Plainly, the benefits of this famous English act were intended primarily for individuals detained for a crime but held without a warrant of commitment, or for individuals held without bail upon a warrant charging a minor offense." *States* at 252. In summary:

> [I]n 1789 in England a person in custody for a crime had the immediate right either to be charged or released. If the crime charged was a misdemeanor there was a right to bail. Once properly

> charged with treason or a felony the only right was to a trial during the next session, which the Crown might delay. *Once convicted of a crime there was no privilege of the writ.*

Collings at 338 (emphasis added). Collings surveys the English experience with "suspension" of the writ, which, of course, only related to *pretrial* curtailments of liberty, because that was the extent of the common-law writ (*id.* at 339-40), and summarizes:

> In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process. *The end result was to deny the right to trial by jury.*

Id. at 340 (emphasis added).

b. American pre-Constitutional experience with the writ and its suspension. The common law writ was in operation in all 13 colonies by 1776, and the 1679 Habeas Corpus Act had been legislatively adopted or judicially applied in six of them. William F. Duker, A Constitutional History of Habeas Corpus 115 (1980). Numerous states adopted the 1679 Act into their own law both before and after the Constitutional Convention, following it so closely that, "Chancellor Kent logically concluded that the Act of 1679 was 'the basis for all the American statutes on the subject'." Collings at 338-39; *accord*, Frank H. Hurd, A Treatise On the Right of Personal Liberty and on the Writ of Habeas Corpus 128 (1876). "The legislation in the twelve original states that followed the English act was uniform in providing that the benefits of the act should not extend to persons properly charged with felony or treason or to 'persons convict' or in execution under civil or criminal process." *States* at 254. "By both common and statute law, the general rule was that the writ was not available to one confined for a crime by a court of competent jurisdiction." *Duker* at 225. "Suspension statutes were aimed at suspects, never at convicts." Collings at 340-41.

c. Evidence from the Convention and ratification process. Records of the Constitutional Convention and the debates concerning adoption reflect no belief by the Framers that they were *creating* a substantive right to habeas corpus in the Suspension Clause, but rather that Congress was being restrained from suspending the *existing* common-law writ, as crystallized in the Habeas Corpus Act of 1679.

Charles Pinkney drafted a provision which would have both positively guaranteed the privilege of habeas corpus and allowed for suspension only upon "the most urgent and pressing occasions," for a period limited to a specified number of months, language closely resembling provisions in the Massachusetts and New Hampshire Constitutions. Collings at 341 and n.34. When the Committee on Detail presented its draft, the Pinkney habeas suggestion was absent, so he renewed the motion. *Id.* Only limited debate is recorded. Mr. Rutledge argued that habeas should be declared "inviolable," reasoning that he "did not conceive that a suspension could ever be necessary at the same time through all the States." 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 438 (1911). Governor Morris responded with a motion that may have been intended to satisfy Rutledge's qualm, by permitting a geographically limited, rather than necessarily nation-wide, suspension: "The privilege of the writ of habeas corpus shall not be suspended, unless where in cases of rebellion or invasion the public safety may require it." *Id.* Mr. Wilson responded to the Morris motion that he doubted whether a suspension could ever be necessary, "as the discretion now exists with judges, in most important cases to keep in gaol or admit to bail." The Morris motion nonetheless passed. *Id.* However, when the final draft was reported out by the Committee on Style, "where" had become "when," and it was passed by the Convention in that form. *Id.* at 596, 656. Thus, the final (and current) form of the Clause "assumes the existence of the privilege" (*Hurd* at 106), rather than purporting to create it.

That the Clause seeks only to protect a privilege already in being is further indicated by its treatment during the ratification debates. Luther Martin explained his negative

vote to the Maryland legislature in terms which presuppose the existence of the privilege; his concern was that authorization given to the central government to suspend the writ could be used as an instrument to oppress those in states which might oppose its policies. 3 *Farrand* at 213. However, his remarks all deal with habeas as a remedy against politically-motivated seizure and detention, and do not seem to conceive at all of habeas as being available to an ordinary convicted criminal. Moreover, his speech contains repeated references to suspension of the "habeas corpus *act*" (*id.*), even though Maryland possessed neither a state constitutional provision nor a state habeas statute until many years later. *States* at 249, 251-52. Hence, it is likely that he was referring to the common law writ as formalized by the Habeas Corpus Act of 1679, which, of course, did not apply to convicts.

To the same effect are the Federalist Papers, "to which, as Thomas Jefferson put it, 'appeal is habitually made by all, and rarely declined or denied by any' as to the 'genuine meaning' of the Constitution." *The Federalist Papers* at vii (C. Rossiter ed. 1961). Answering complaints that the Constitution does not expressly protect the right to jury trial in civil cases, Hamilton argues (No. 83) that it is far more important to provide protections in criminal cases, and that the Constitution does so:

> Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus act*, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

Id. at 499 (emphasis added). Since the Constitution contains no positive grant of habeas corpus, Hamilton could have only meant that it amply provides for the protection of the pre-existing right, the well-known Habeas Corpus Act of 1679,

which had been applied in New York in colonial cases. *Duker* at 115.

This conclusion is borne out by the second reference to habeas corpus, found in No. 84, where Hamilton is responding to the criticism that the Constitution should have included a bill of rights. He first enumerates the many protections which are included in the proposed Constitution, including limits on penalties to be imposed by impeachment, protection of jury trial, prohibition of bills of attainder or *ex post facto* laws, and the Suspension Clause. *Federalist* at 510-11. He then argues:

> It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of *titles of nobility, to which we have no corresponding provision in our [New York] Constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas*

> *corpus* act, which in one place he calls "the BULWARK of the British Constitution."

Id. at 511-12 (various emphases all original). Once again, we find: emphasis on habeas corpus as a remedy against summary imprisonments by arbitrary government (not a device for the relief of common criminals), and reliance on the common law tradition (embodied in "judicious Blackstone," together with the *act* which is the "BULWARK of the British Constitution") to define what is being "established" in the Suspension Clause.

Although Thomas Jefferson and four of the state ratifying conventions urged adoption of a bill of rights which established the habeas privilege in positive terms, no such affirmative right to habeas was proposed for inclusion in the Bill of Rights by the First Congress. Collings at 342-44. Instead, authority to issue the writ was granted to the federal courts in the Judiciary Act of 1789.

> [N]othing in the historical background provides any indication that a prisoner convicted according to the course of the common law was ever entitled to the writ. Furthermore, nothing in that history suggests that it was ever thought to be suspension of the writ to deprive convicts of its use. It seems altogether unlikely that the First Congress viewed the habeas corpus clause as establishing an affirmative right to the privilege of the writ. If they had so viewed the clause, why did they think it necessary in the Judiciary Act of 1789 to affirmatively give the federal courts jurisdiction to issue the writ? *One is driven to the conclusion that under our constitution, at least as it was understood in 1789, there was no right on the part of convicted prisoners to the privilege of habeas corpus. Such a right, if it was to exist at all, would have to come from Congress.*

Id. at 345 (emphasis added).

d. Early judicial considerations of the Clause. The first occasion for construing the Suspension Clause arose in *Ex parte Bollman*. As we have seen, Chief Justice Marshall

invoked Blackstone and the English common law in interpreting both the Clause and the Judiciary Act, and that was the Court's practice for many years. "This legislation [of 1679] and the decisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts." *McNally v. Hill*, 293 U.S. 131, 136 (1934) (citing cases). His acceptance of habeas as peculiarly a pretrial remedy was clearly indicated in *Bollman*, where he remarked that the question brought forward by a habeas petition is always separate from what is involved in "the cause itself": "The question whether the individual shall be imprisoned is always distinct from the question whether he *shall be* convicted or acquitted of the charge on which he *is to be* tried . . . " 4 Cranch at 101 (emphasis added). That the writ available through the federal courts did not extend to persons already convicted of crime by a court of competent jurisdiction was expressly stated in *Ex parte Watkins*, 3 Pet. at 202-03 (specifically following the Habeas Corpus Act of 1679). It is equally plain that habeas corpus did not afford any protection to persons in *state* custody; Section 14 of the Judiciary Act was limited to prisoners in custody "under or by colour of the authority of the United States." That the Judiciary Act's preclusion of state prisoner access to habeas relief deprived the federal courts of jurisdiction was acknowledged by *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845). Other than some narrow situations (also established by statute), no right of habeas for state prisoners existed until passage of the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. *Felker v. Turpin*, 116 S. Ct. at 2338.

The 1789 Judiciary Act was created by a Congress that included many of the drafters of the Constitution, and it is inconceivable that that group would have passed anything which could have been perceived as trenching upon so dear a right as habeas corpus, particularly in light of the essentially simultaneous calls for inclusion of a positive guarantee of habeas corpus in the federal Bill of Rights. Chief Justice Marshall himself remarked:

> [T]his act was passed by the first congress of the United States, sitting under the constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suppression should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*.

Bollman, 4 Cranch at 95. The necessary conclusion is that excluding persons under criminal conviction from habeas protection (and convicted *state* prisoners doubly so) was *not* a violation of the Clause, as understood by its own drafters. That conclusion ought to be determinative for this Court as well.

> [E]arly congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning." Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions."

Printz v. United States, 117 S. Ct. 2365, 2370 (1997) (citations omitted).

e. Lessons from the Civil War and Reconstruction. Habeas corpus and the Suspension Clause received great attention during the Civil War, because President Lincoln actually did suspend the writ. See generally MARK E. NEELY, JR., THE ABRAHAM LINCOLN ENCYCLOPEDIA, "Habeas Corpus," 132-35 (1982).

Most significant for present purposes is the fact that, although there was heated debate about whether the Constitution lodged the authority to suspend the writ in the Executive

or only in the Congress, all parties to the controversy continued to look to English common law to determine the extent of the writ which was being suspended, and hence to treat habeas as strictly a remedy for detention without trial, rather than a means for quasi-appellate review of ordinary criminal convictions. For example, Chief Justice Taney, sitting as a circuit justice, directed that a southern sympathizer seized by military authorities should be released, on the grounds that Lincoln's executive order suspending habeas corpus was ineffective because only Congress could suspend the writ. *In re Merryman*, 17 Fed. Cas. 144 (1861), *reprinted in* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION 155-58 (1864). Taney's opinion, although applying the Suspension Clause and the Judiciary Act of 1789, continues to rely on the English Habeas Corpus Act of 1679 and English commentators (Blackstone and Hallam) to define the writ, and repeatedly refers to it as a means of obtaining *pretrial* release: under English practice, "if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character the court was bound to set him at liberty on bail" (*id.* at 156); freemen detained in prison on criminal charges could demand *habeas corpus ad subjiciendum*, and "according to the nature of the charge," the court would remand him, admit him to bail, or discharge him (*id.* at 157); Parliament could, by suspending the writ, authorize the Crown to imprison "suspected persons." *Id.*

Merryman was answered by a formal opinion from Lincoln's Attorney General, Edward Bates. *Id.* at 158-61. Much of the opinion is devoted to defending the President's right to suspend the writ, but when he discusses the nature of habeas corpus, Bates relies upon the same sources as Taney – English common law, especially as summarized by Blackstone. *Id.* at 160-61. Indeed, he considers that the federal courts have, under the Judiciary Act of 1789, "equivalent powers" to those exercised by the English courts. *Id.* at 160. Notable is his understanding of the Suspension Clause as a guard interposed against a replication of the English Government's assumption

of the power "to imprison whom it would, and hold them, for an indefinite term, beyond the reach of judicial examination" – an understanding which obviously does not contemplate the Suspension Clause as insuring post-trial review of ordinary criminal convictions.[5] And, most relevant to the current controversy, Bates states:

> [T]he Constitution is older than the judiciary act, and yet it speaks of the privilege of the writ of *habeas corpus* as a thing in existence; it is in general terms, and does not speak with particular reference to powers which might or might not be granted by a future act of Congress. Besides, *I take it for certain that, in the common course of legislation, Congress has power, at any time, to repeal the judiciary act of 1789 and the act of 1833 (which grants to the courts and to the judges the power to issue the writs) without waiting for a rebellion or invasion, and a consequent public necessity, to justify, under the Constitution, the suspension of the privilege of the writ of habeas corpus.*

Id. at 161 (emphasis added). Thus, between *Bollman* and Bates (and Lincoln), this Court and the highest Executive legal authorities agreed, throughout the early history of the

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[5] Lincoln, himself an accomplished attorney, likewise did not regard the Suspension Clause as guaranteeing the use of habeas corpus for review of ordinary criminal convictions. In a message to Congress, dated July 4, 1861, he described actions taken to deal with the crisis; among those, " to authorize the Commanding General . . . *to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without resort to the ordinary processes and forms of law*, such individuals as he might deem dangerous to the public safety." 4 COLLECTED WORKS OF ABRAHAM LINCOLN 429 (R. Basler ed. 1953) (emphasis added). His 1863 response to resolutions protesting the military arrest and detention of Clement Vallandigham states: "Habeas Corpus, *does not discharge men who are proved to be guilty of defined crime*; and its suspension is allowed by the constitution on purpose that, *men may be arrested and held, who cannot be proved to be guilty of defined crime . . .* " *Id.*, Vol. 6 at 264 (emphasis added).

republic, that habeas was not intended for relief of criminals after conviction, that power to issue the writ originates in statute, and that that statutory authority can permissibly be limited or eliminated.

That what Congress bestows out of legislative grace with regard to habeas corpus it may also limit, regulate, or take away was dramatically illustrated in the McCardle affair. In the Act of February 5, 1867 (14 Stat. 385), Congress had extended the habeas corpus jurisdiction of the federal courts to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States," and authorized appeals in such cases to the circuit courts and this Court. McCardle, the editor of a Mississippi newspaper, was taken into custody to be tried by a military commission, on the grounds that he had published "incendiary and libellous" articles, so he pursued habeas relief, including an appeal to this Court. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868). After denying a motion to dismiss the appeal, this Court heard argument on the merits for four days in early March of 1868, and took the matter under advisement, but before a decision could be reached, Congress passed a new statute (15 Stat. 44), eliminating this Court's authority to hear appeals in habeas cases. *Id.*[6] Despite fervent argument from McCardle's counsel, asserting that acceptance of such elimination of jurisdiction would imply power in Congress to deprive the Court of all authority, so that the Constitutionally-endowed "judicial power of the United States" would cease to exist, this Court agreed that the Act of 1868 had effectually removed its appellate jurisdiction, and dismissed the case. *Id.* at 509-10, 512-15.) That holding

[6] The specific design of this repeal, "as was avowed by Mr. Schenck, chairman of the House committee on ways and means, [was to] prevent[ ] this court from passing on the validity of reconstruction legislation." *Myers v. United States*, 272 U.S. 52, 166 (1926).

was reaffirmed in *Ex part Yerger*, 75 U.S. (8 Wall.) 85 (1868).[7]

McCardle and *Yerger* show that the authority of the federal courts to issue habeas corpus writs is fundamentally statutory in nature. It is constitutionally permissible for Congress to so limit that jurisdiction as to deprive some or all federal courts of habeas jurisdiction, and such elimination of habeas jurisdiction is effective, even when what might be considered "equitable" considerations (such as the arguably "bad" motive of Congress, and McCardle's reasonable expectation of receiving an adjudication of a fully-briefed, and under-submission case) seem to weigh in favor of the existence of jurisdiction. If Congress could eliminate federal ability to hear McCardle's appeal – and this Court held that it could – it is difficult to discern why Congress cannot also eliminate district court ability to hear Martinez-Villareal's competency claim, especially when it is presented in a second petition.

f. Modern statutes and cases. It is beyond the scope of this brief to thoroughly analyze habeas jurisprudence subsequent to the Reconstruction era, so only a few highlights will be noted. There unquestionably was a trend in this Court's opinions toward expanding availability of the writ, though that tendency recently has been reversed in some significant respects. *See, e.g., McCleskey v. Zant*, 499 U.S. at 478-96 (summarizing judicial expansion but imposing tightened "abuse of the writ" standard). On the other hand, aside from restoring this Court's appellate authority in habeas cases in 1885 (23 Stat. 437), Congress has generally tended to restrict the exercise of habeas, and such statutes have never been treated as violative of the Suspension Clause. *See, e.g.,*

[7] Although the Suspension Clause was not mentioned in *McCardle*, it was discussed at length in *Yerger*, which the Court described as undertaking a complete reconsideration of "the grounds upon which its jurisdiction has been heretofore maintained." 8 Wall. at 95. Thus, at least by implication, *Yerger* indicates that Congressional revocation of some aspect of habeas jurisdiction it had previously granted does not violate the Clause.

Whitney v. Dick, 202 U.S. 132 (1906) (newly-created courts of appeals not granted authority to issue original writs), and *Ahrens v. Clark*, 335 U.S. 188 (1948) (limiting territorially district court authority to issue the writ).

> Seemingly there is no constitutional objection in failing to make provision for habeas corpus, or even in abrogating it altogether as to particular persons or classes of persons. . . . Surely then when Congress increases the availability of the writ, only to find abuse, it can take corrective measures.

Collings at 359-61 (citing cases). That conclusion is supported by decisions subsequent to publication of the Collings article. For example, this Court vowed to enforce "the 1966 amendments embodied in § 2254(d) [that] were intended by Congress as limitations on the exercise of that [habeas] jurisdiction." *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). Most recently, of course, in *Felker*, this Court upheld the limits on successive petitions in the AEDPA against an explicit Suspension Clause challenge.

That this Court construed the availability of habeas relief expansively in the past clearly does not mean that Congressional enactment of limiting legislation amounts to a Suspension Clause violation. Even the most pro-expansion justices, whether in the majority or the minority, consistently acknowledged that ultimately it lies with Congress to define habeas corpus jurisdiction, thereby implicitly endorsing the thesis argued in this brief. "Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953). The most detailed rationalization for judicial expansion of the writ, Justice Brennan's opinion in *Fay v. Noia*, 372 U.S. 391 (1963), still speaks of: "the federal habeas corpus jurisdiction, 28 U.S.C. § 2241 et seq." *id.* at 394; "the power granted the federal courts under the federal habeas statute" (*id.* at 399); "the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary" (*id.* at 405); "power of the federal courts under 28 U.S.C. § 2243" (*id.* at 430). Similarly, again writing for the Court, he stated that, "With regard to both [federal and state prisoners] *Congress has determined* that the full protection of

their constitutional rights requires the availability of a mechanism for collateral attack." *Kaufman v. United States*, 394 U.S. 217, 228 (1969) (emphasis added).

The tide turned against expansive interpretation of the availability of the writ in *Stone v. Powell*, 428 U.S. 465 (1976), which overruled *Kaufman* and placed fully and fairly litigated Fourth Amendment claims outside federal habeas corpus consideration. Justice Brennan argued in dissent that the Court's action impermissibly "rewr[o]te jurisdictional statutes enacted by Congress." (*Id.* at 506.) Particularly noteworthy is his approving quotation of language from Justice Frankfurter's opinion in *Brown v. Allen*, including the following:

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. . . . It is not for us to determine whether this power should have been vested in the federal courts. . . . *[T]he wisdom of such a modification in the law is for Congress to consider . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress.* . . . Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. . . . *It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law.*

Id. at 526-28 (all emphasis added by Brennan). Justice Brennan's own statements are in the same vein: "[T]here is no constitutional warrant in this Court to override a congressional determination respecting federal-court review of decisions of state judges determining constitutional claims of state prisoners." *Id.* at 529. "[I]t is a matter for Congress, not this Court, to prescribe what federal courts are to review state prisoner's claims of constitutional error committed by state courts. . . . [T]he Court usurps the authority – vested by the Constitution in Congress – to reassign federal judicial responsibility for reviewing state prisoners' claims . . . " *Id.* at 535.

It therefore is clear that the greatest champions of judicial habeas expansion have accepted the power of Congress to thwart such expansion by enactment of restrictive legislation. It is of special interest to this case, in which Petitioners argue that Congress can preclude Martinez-Villareal from raising a purely sentence-related claim, that dissents by Justices Brennan and Marshall accept the idea that whether such claims can be presented in habeas corpus is a matter for Congress to decide. *See Teague v. Lane*, 489 U.S. 288, 339 (1989) ("Congress has not seen fit to withdraw" the benefits of allowing the federal courts to decide novel habeas claims not substantially related to guilt or innocence "by amending the statute that provides for them."); *Duckworth v. Eagan*, 492 U.S. 195, 223-24 (1989) (argument against Justice O'Connor's view "that federal habeas review should extend only to guilt-related claims" based on fact that "Congress believed that defendants have rights, often unrelated to guilt or innocence, that would be worthy of collateral protection."). They would, therefore, have been required on principle to reject the action of the court of appeals in this case, which was nothing less than an arrogation to itself of authority to insist that a non-guilt claim be heard in habeas, and to determine which federal court should hear it (the lower federal courts by habeas, rather than this Court by certiorari), all contrary to the clearly expressed will of Congress.

g. Conclusions. It does not violate the Suspension Clause to apply the AEDPA to foreclose a successive petition by Martinez-Villareal. The Clause is only violated when the writ is restricted to a narrower compass than it enjoyed when the Clause was drafted, but the writ protected by the Suspension Clause extended neither to convicts of any sort, nor to persons held under state (as opposed to federal) authority. The restrictions effected by § 2244(b)(1) and (2) do not abrogate the privilege of habeas corpus, but apply some limits on its availability in *successive* applications, which this Court has consistently agreed ought to be restricted more than initial petitions. *See, e.g., Lonchar v. Thomas*. In the debates concerning the AEDPA, members of both houses repeatedly voiced understanding of the distinction between the modern,

statutorily-created habeas writ and the "Great Writ" which is protected by the Suspension Clause.[8] Thus, Congress' intent to do only what was constitutionally permissible for it to do – modify the *statutory* writ of habeas corpus it had created in 1867, while leaving the Constitutionally-protected "Great Writ" untouched – is certain.

There having been no petitions available at all for persons like Martinez-Villareal in 1789, the AEDPA's partial return to a jurisprudential state of affairs more closely resembling that which prevailed, at the time of the Framers, cannot reasonably be deemed a "suspension" of the writ. DUKER at 155.[9] "[I]t is conventionally assumed that perpetuation of federal district court habeas corpus jurisdiction is not constitutionally required, on the theory that Congress is free to give what items of federal jurisdiction it chooses to courts which, unlike the Supreme Court, exist only by congressional sufferance." Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus For State Prisoners*, 66 YALE L.J. 50, 63 (1966).

It therefore appears that the Ninth Circuit was still laboring under the erroneous "revisionist view of the historic function that [habeas corpus] writ was meant to perform" (*Schneckloth v. Bustamonte*, 412 U.S. at 252), which Justice Powell debunked more than 25 years ago. Because it is plain that the AEDPA's restrictions on successive petitions do not violate the Suspension Clause, the court of appeals' decision collapses – no violation means no grounds for redrafting the

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[8] 141 Cong. Rec. H1402, H1408, H1410 (daily ed. Feb. 8, 1995); S7836, S7841 (daily ed. June 7, 1995); S3447 (daily ed. April 17, 1996). Indeed, one congressman quoted the Powell Commission Report's statement that the Constitution "does not provide for federal habeas corpus review of state court decisions." 141 Cong. Rec. H1415 (daily ed. Feb. 8, 1995).

[9] Professor Duker's thesis (126-56) is that the Suspension Clause was intended only to prevent Congress from suspending *state* habeas remedies. Without referring to Duker, such a concept was described as a "cogent argument" in JOSEPHINE R. POTUTO, PRISONER COLLATERAL ATTACKS § 1:4 at 8 (1991).

statute and no basis for either transferring Martinez-Villareal's successive petition to the district court or permitting it to be filed.

C. Martinez-Villareal Cannot Be Exempted From The Operation of the Act.

Though elaborately dressed in language about stays which must be issued to prevent issues becoming moot and exhaustion principles (118 F.3d at 630, 632-34), the crux of the court of appeals' reason for its decision in this case is that it had to devise a mechanism "to ensure that a petitioner's federal claims are accorded one hearing in federal court." *Id.* at 633. Martinez-Villareal certainly *did* present a "federal claim" in his certiorari petition to this Court, after the state courts had determined him to be competent for execution, but the court of appeals deemed that process insufficient. *Id.* at 631 n.3. What the court of appeals really said is that it is free to disregard the plain meaning of the Act, to guarantee that Martinez-Villareal present his competency claim to a *district court*. That is plainly wrong. Despite relying upon other parts of that decision, the court of appeals disregarded the central point of *Lonchar v. Thomas*, that legal principles governing habeas corpus today are primarily embodied in statutes, so that the "balancing of objectives (sometimes controversial) . . . is normally for Congress to make," and the courts are entitled to make such determinations *only* "when Congress has not resolved the question." 116 S. Ct. at 1298.

> [T]he fact that the writ has been called an "equitable remedy" does not authorize a court to ignore this body of statutes, rules, and precedents. "There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges." Rather, "courts of equity must be governed by rules and precedents no less than the courts of law." As Selden pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot.

Id. (citations omitted). Since Congress, through the restrictions promulgated in § 2244(b)(1) and (2), *has* "resolved the question" of which successive petitions may be heard, the court of appeals was not free to fashion an exemption from those restrictions to fit what it perceived to be the balance of equities presented by the supposedly "unique nature of a competency claim" such as Martinez-Villareal's. See 118 F.3d at 634.

In fact, Martinez-Villareal's situation is not at all unique. He is just like every other convict who has found himself outside the scope of available relief, and had his expectations of consideration of his claims dashed, when some line has been drawn. Who could urge more strongly that "fairness" entitled him to a decision on his claims than Mr. McCardle, whose case had been briefed, argued, and taken under submission by this Court? But when Congress changed the rules, this Court accepted that, regardless of how well-founded his expectations of relief might have been. McCardle was out of court. Martinez-Villareal's situation is not distinguishable from those of multitudes of petitioners (including many under sentences of death) who have found themselves on the wrong side of new restrictions on habeas relief: Warren McCleskey's expectations of relief ran aground when this Court adopted the rule that the cause and prejudice standard would be applied to questions of "abuse of the writ." The expectations of Frank Teague and Horace Butler went a glimmering when the Court determined that "new rules" of criminal procedure could not normally be adopted in habeas proceedings, and this Court subsequently stated that, "Nor does such a [habeas] petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest . . . " *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993).

The situation is no different when the change occurs by statute. A murderer named Randy Greenawalt was executed despite his claim (remarkably similar to Martinez-Villareal's) that the AEDPA's preclusion of his successive petition

(involving a sentence-related claim which was not exhausted until after enactment of the statute) created an "unprecedented situation" amounting to a violation of the Suspension Clause. *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997). Despite the allegedly "special" nature of a claim of incompetency to be executed, the Act was applied to preclude such claims in successive petitions (regardless of the rationale for not presenting them previously) in both *Medina*, 109 F.3d at 1561-65, and *Davis*, 121 F.3d at 955-56.

Although not mentioning it by name, the court of appeals' decision here resonates with echoes of *Fay v. Noia*. *Fay* asserted that the function of habeas corpus is, without limitation of any kind, "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." 372 U.S. at 401-02. It therefore insisted that, "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." 372 U.S. at 424. This view of habeas corpus as affording guaranteed access to the federal district courts for review of state criminal convictions purported to stand on two historical pillars: the breadth of the common law writ, as adopted into American law through the Judiciary Act of 1789 (*id.* at 399-406, 422-23), and the expansion authorized by the Act of 1867. *Id.* at 415-22.

The validity of this historical analysis, which ignored the information in Professor Bator's then-recent Harvard Law Review article, was strongly challenged even when it was announced, by Justice Harlan's dissent. *Id.* at 449-63. Now, under the assault of intense historical investigation, both of *Fay*'s pillars have crumbled. Fay's statements about the common law usages of habeas and about the intent of Congress in passing the Act of 1867 having been shown to be deeply flawed. *See, e.g.*, Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court*

as Legal Historian, 33 U. CHI. L. REV. 31 (1965); Henry J. Friendly, *Is Innocence Irrelevant?, supra.*[10]

Moreover, quite apart from its historical inaccuracy, *Fay's* belief in the universal availability of federal review of federal questions has been rejected by this Court, both in the context of habeas corpus and elsewhere. Although that rejection is most explicit in *Wainwright v. Sykes*, 433 U.S. 72, 87-89 (19977), *Coleman v. Thompson*, 501 U.S. 772, 744-51 (1991), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-8 (1992), it is clearly reflected in other statements by the Court as well. "Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights." *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510 (1982) (finding no federal jurisdiction over involuntary termination of parental rights). The Court disapproved "a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises," in *Allen v. McCurry*, 449 U.S 90, 103-04 (1980) (construing 28 U.S.C. § 1983). "[T]here is no 'universal right to litigate a federal claim in a federal district court.' " *Matsushita Electrical Industrial Co., Inc., v. Epstein*, ___ U.S. ___, 116 S. Ct. 873, 883 (1996).[11]

The court of appeals' handling of this case not only divests Congress of its authority to legislate with regard to

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[10] Efforts to challenge Professor Bator and support *Fay*'s analysis have been unsuccessful. *See, e.g.*, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995) (critiquing works by Gary Peller, James Liebman, and Ann Woolhandler).

[11] Justice Scalia has specifically criticized "the theory advanced in *Fay v. Noia*, that a federal forum must be afforded for every federal claim of a state criminal defendant" as being "profoundly wrong." *Withrow v. Williams*, 507 U.S. 680, 721-24 (1993) (concurring in part and dissenting in part).

habeas corpus, it unacceptably denigrates the ability of state courts to make responsible determinations of federal questions such as competency for execution.

> While we can assume there is a special role for Article III courts in the interpretation and application of federal law in [some] instances . . . , we do not for that reason conclude that state courts are a less than adequate forum for resolving federal questions. A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism. In *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976), we expressed our "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so."

Idaho v. Coeur d'Alene Tribe of Idaho, ___ U.S. ___, 117 S. Ct. 2028, 2037 (1997).

It being clear that the Suspension Clause is not violated by enforcing the § 2244(b)(1) and (2) restrictions on successive petitions, the court of appeals was not entitled to disregard the plain meaning of the statute. *Sumner v. Mata*, 449 U.S. at 545-48 and n.2 (this Court refused to read limitation into language of habeas statute and affirmed that "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded"). Martinez-Villareal was accorded a full and fair opportunity to litigate his competency for execution in the state court, with opportunity to request certiorari review in this Court, and that is all that he is entitled to.[12] Therefore,

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[12] Permitting federal review of competency for execution only by certiorari does not prejudice inmates because, even apart from the AEDPA's restrictions, the scope of review of such claims is extremely narrow. Competency determinations are factual matters, based largely on assessment of demeanor and credibility, so the trial judge's conclusions must be accepted by all federal courts if supported by the record. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Miller v. Fenton*, 474 U.S. 104, 112-17 (1985); *Maggio v. Fulford*, 462 U.S. 111, 116-18 (1983). All the opinions in *Ford v. Wainwright* clearly contemplated that that standard of review would apply to competency for execution, and federal cases applying *Ford* consistently defer to state court determinations supported by the evidence. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.), *cert. denied*, 115 S. Ct. 1841 (1995); *Shaw v. Armontrout*, 900 F.2d 123, 126 (8th Cir. 1990); *Graham v. Lynaugh*, 854 F.2d 715, 720-21 (5th Cir. 1988). Where (as here) the state court conducted a meaningful evidentiary hearing, there simply will be no grounds for relief, regardless of which federal court conducts the review. In effect, the state court's determination of the fact-bound competency issue is dispositive of the federal claim.

this Court should enforce the Act in this case, by holding that Martinez-Villareal is subject to it, that his current petition *is* successive, and that because it does not satisfy the requirements of the Act, it cannot be entertained by the district court.

III

REGARDLESS OF HOW THE COURT DETERMINES THE MERITS OF THE CLAIMS PRESENTED BY PETITIONERS, THE COURT POSSESSES JURISDICTION OVER THOSE CLAIMS.

A. Propriety of Relying on Multiple Jurisdictional Basis.

The appropriate basis for the Court's jurisdiction is bound up with the merits of the case. This matter reached the Ninth Circuit through a motion requesting permission to file a successive petition, as required by 28 U.S.C. § 2244(b)(3)(A). Section 2244(b)(3)(E) forbids review of such rulings by rehearing or certiorari, suggesting that parties seeking review of the circuit court's determination cannot use "statutory" certiorari, and can obtain relief only by a writ under 28 U.S.C. § 1651(a). However, the Ninth Circuit refused to apply the AEDPA, and avoided its constraints on successive habeas petitions by creating a special category of "non-successive" successive petitions. 118 F.3d at 632-35. If the AEDPA and its preclusion of review do not apply here, then ordinary certiorari is available. However, Petitioners' position is that the Ninth Circuit is wrong in its interpretation of the AEDPA, so

that if Petitioners approached this Court only by means of statutory certiorari, and persuaded it that the Ninth Circuit should have applied the Act, they might find that they had lost their remedy, by persuading the Court that it lacks jurisdiction to hear the case. *Cf. Felker*, 116 S. Ct. at 2341 (dismissing writ of certiorari for lack of jurisdiction).

To avoid this possibility, Petitioners brought a combined petition, relying on both statutory certiorari (28 U.S.C. § 1254(1)) and all the various forms of relief permitted under the All Writs Act (28 U.S.C. § 1651(a)). This Court simultaneously entertained variously-framed petitions, brought by different parties but all raising the same issue of statutory construction, in *Ex parte Collett*, 337 U.S. 55, 57 (1949), *Kilpatrick v. Texas & Pacific Ry. Co.*, 337 U.S. 75, 77 (1949), and *United States v. National City Lines, Inc.*, 337 U.S. 78, 80 (1949). Its willingness to do so seems to indicate that, where there is doubt about the appropriate vehicle by which to present an important statutory or constitutional issue, providing a variety of options, so that the procedural niceties of any particular mechanism do not prevent review, is acceptable to the Court. *See* R. STERN ET AL, SUPREME COURT PRACTICE at 493-94 and n.5 (7th ed. 1996). Although the Court granted "certiorari" in this case, it did not specify the authority employed. Since the issue apparently remains open, Petitioners discuss below what appear to be the relevant jurisdictional concerns, but the Court is urged to employ whatever procedural option it prefers to reach the merits of this case.

B. "Statutory" Certiorari Under 28 U.S.C. § 1254(1).

If the preclusion of certiorari review in 28 U.S.C. § 2244(b)(3)(E) applies to the court of appeals' decision in this case, then this Court would have to resort to an "extraordinary writ" to consider the matter. However, Petitioners contend that statutory certiorari *is* available, because of the nature of the ruling actually made by the Ninth Circuit and because of the language of the review-prohibiting provision.

The § 2244(b)(3)(E) prohibition on review applies only to "The grant or denial of an authorization by a court of

appeals to file a second or successive application . . . " However, the Ninth Circuit neither granted nor denied authorization for the filing of a second or successive petition. Instead, it concluded that, "Martinez-Villareal's competency claim *is not subject to the restrictions imposed by § 2244(b).* Therefore, *we dismiss as unnecessary* Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court." 118 F.3d at 634 (emphasis added). Thus, the issue before this Court simply is not one to which the prohibition of review applies – the question here is whether the court of appeals was correct that "the restrictions imposed by § 2244(b)" do not govern competency for execution claims, and only if *that* decision is reversed will any court actually determine whether authorization should be granted for the filing of a second petition by Martinez-Villareal. Hence, the prohibition against review is not applicable.

That this is the proper approach is demonstrated by this Court's handling of prior cases involving similar restrictions on review. *See Johnson v. Robison*, 415 U.S. 361, 267 (1974); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492 (1991). Similarly, the issues here are the proper *construction* of the AEDPA (*i.e.*, whether it should be understood to apply to the *class* of claims of incompetency for execution presented in successive habeas petitions), and the *constitutionality* of the AEDPA, rather than an individual determination *under* the AEDPA about whether to grant authorization for a particular successive petition. Therefore, *Johnson* and *McNary* show that the prohibition on review in 28 U.S.C. § 2244(b)(3)(E) does not apply to the questions raised by this case, and that this Court can exercise review by means of "statutory" certiorari.

C. Jurisdiction Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and Supreme Court Rule 20.

The types of writs available under the statute have been summarized as follows:

> In general, the writ of mandamus is sought to compel a lower court to do something it has refused

> to do, and the writ of prohibition to prohibit it from doing something it otherwise will do. But since almost any issue may be phrased either affirmatively or negatively, these writs are often used interchangeably; frequently, indeed, counsel request both "mandamus and prohibition" to play it safe. The writ of certiorari under § 1651 orders the lower court to certify the record to the Supreme Court. This rarely used writ has been used to bring before the Court for review, in exceptional circumstances, otherwise non-appealable orders. It "is not the statutory writ of certiorari" but instead "a kind of reserve power, preserved by the 'all-writs' section, 28 U.S.C. § 1651(a), and available for use in exceptional cases."
>
> Although the several writs to some extent serve different functions, they overlap considerably, and the same general principles guide the Court in determining whether to allow each of them.

STERN ET AL. at 493-94 (citations omitted). This case demonstrates the truth of these comments: we have exceptional circumstances involving an arguably non-appealable order; Petitioners desire the district court to be prohibited from entertaining Martinez-Villareal's successive habeas petition; but the occasion for the problem is the court of appeals' usurpation of judicial power, by imposing on the AEDPA an interpretation it will not bear, so that it supposedly allows Martinez-Villareal to file a successive petition. Therefore, Petitioners request this Court to use whichever writ it deems proper to review the court of appeals' "proposed disposition of a motion for leave to file a second or successive habeas petition," as invited by the concurring opinions of Justices Stevens and Souter in *Felker*, 116 S. Ct. at 2341.

Section 1651(a), as explicated by Supreme Court Rule 20, requires that for the extraordinary writs to issue: (1) such action must be in aid of this Court's appellate jurisdiction; (2) exceptional circumstances must exist that warrant the exercise of this Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court.

All of these somewhat overlapping considerations are present in this case.

Granting an "extraordinary writ" here would be particularly appropriate in light of this Court's announced willingness to employ such a writ "where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *State of Maryland v. Soper*, 270 U.S. 9, 46 S. Ct. 185, 70 L. Ed. 449 (1926)." *Will v. United States*, 389 U.S. 90, 95 (1967). In *Soper*, this Court recognized that the effect of the removal to federal court of a murder case involving revenue agents was that "the jurisdiction of the courts of a state to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court;" therefore, to prevent improper intrusion by an inferior federal court into the criminal processes of a state (comparable to the intrusions that this Court and Congress recognize are visited upon the states through excessive habeas proceedings), this Court granted mandamus and reversed the erroneous removal order. 270 U.S. at 29-30.

In sum, Petitioners assert that jurisdiction exists for this Court to review the Ninth Circuit's decision by means of ordinary "statutory" certiorari, despite the existence of the limitation on review included in the AEDPA. If, however, the Court concludes that statutory certiorari is unavailable, it should exercise its discretion to hear the case under whichever of the § 1651(a) "extraordinary writs" is appropriate.

CONCLUSION

The Ninth Circuit has usurped legislative authority by rewriting the 1996 Antiterrorism and Effective Death Penalty Act, even though that statute does not, in fact, contravene the Suspension Clause. Martinez-Villareal is not constitutionally entitled to federal collateral review of his competency for execution claim, and has had full and fair direct state and federal review of that factual issue. Petitioners therefore respectfully urge this Court to use whatever writ is appropriate, to review this case and to correct the error of the court of

appeals, by holding that Martinez-Villareal *has* filed a successive petition subject to the restrictions of the AEDPA, that it does not meet the requirements of that statute, and that the court of appeals' order transferring the petition to the district court must be vacated, the successive petition to be dismissed with prejudice.

Respectfully submitted,

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APENDICES

APPENDIX A

28 U.S.C. §§ 2244, 2253, 2254, and 2255, as amended (Reflecting changes effected by P.L. 104-132, Antiterrorism and Effective Death Penalty Act of 1996)

§ 2244. FINALITY OF DETERMINATION [Amended.]

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus ~~and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry,~~ *except as provided in section 2255.*

~~(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.~~

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not

be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme

Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub. L. 104-132, §§ 101, 106.)

§ 2253. APPEAL [Amended.]

(a) In a habeas corpus proceeding *or a proceeding under section 2255* before a ~~circuit or~~ district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit ~~where~~ *in which* the proceeding is ~~had~~ *held.*

(b) There shall be no right of appeal from ~~such an~~ *a final* order in a proceeding to test the validity of a warrant to remove~~;~~ to another district or place for commitment or trial~~;~~ a person charged with a criminal offense against the United States, or to test the validity of ~~his~~ *such person's* detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an ~~An~~ appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding ~~where~~ *in which* the detention complained of arises out of process issued by a State court ~~; unless the justice or judge who rendered the order or a~~

~~circuit justice or judge issues a certificate of probable cause.~~; *or*

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub. L. 104-132, § 102.)

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS [Amended.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)*(1)* An application for a writ of habeas corpus *on* ~~in~~ behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State~~;~~ or ~~that~~

(B)(1) there is ~~either~~ an absence of available State corrective process; or ~~the existence of~~

(ii) circumstances *exist that* render~~ing~~ such process ineffective to protect the rights of the *applicant* ~~prisoner~~.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

~~*(d)*~~*(e)(1)* In *a* ~~any~~proceeding instituted ~~in a Federal court~~ by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ~~after a hearing on the merits~~ of a factual issue; made by a State court ~~of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion; or other reliable and adequate written indicia;~~ shall be presumed to be correct. *The applicant*

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. ~~*; unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –*~~

~~*(1) that the merits of the factual dispute were not resolved in the State court hearing;*~~

~~*(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;*~~

~~*(3) that he material facts were not adequately developed at the State court hearing;*~~

~~*(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;*~~

~~*(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;*~~

~~*(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or*~~

~~*(7) that the applicant was otherwise denied due process of law in the State court proceeding;*~~

~~*(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made; pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:*~~

~~*And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant or establish by convincing evidence that the factual determination by the State court was erroneous.*~~

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(e)~~*(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the

record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~*(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act,[1] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(1) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub. L. 104-132, § 104.)

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[1] 21 U.S.C. § 848.

§ 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE [Amended.]

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub. L. 104-132, § 105.)

§ 2253. APPEAL [Amended.]

(a) In a habeas corpus proceeding *or a proceeding under section 2255* before a ~~circuit or~~ district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit ~~where~~ *in which* the proceeding is ~~had~~ *held.*

(b) There shall be no right of appeal from ~~such an~~ *a final* order in a proceeding to test the validity of a warrant to remove~~;~~ to another district or place for commitment or trial~~;~~ a person charged with a criminal offense against the United States, or to test the validity of ~~his~~ *such person's* detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an ~~An~~ appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding ~~where~~ *in which* the detention complained of arises out of process issued by a State court~~; unless the justice or judge who rendered the order or a~~

~~circuit justice or judge issues a certificate of probable cause;~~ *or*

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub. L. 104-132, § 102.)

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS [Amended.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)*(1)* An application for a writ of habeas corpus *on* ~~in~~ behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State~~;~~ or ~~that~~

(B)(1) there is ~~either~~ an absence of available State corrective process; or ~~the existence of~~

(ii) circumstances *exist that* render~~ing~~ such process ineffective to protect the rights of the *applicant* ~~prisoner~~.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

~~(d)~~*(e)(1)* In *a* ~~any~~ proceeding instituted ~~in a Federal court~~ by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ~~after a hearing on the merits~~ of a factual issue; made by a State court ~~of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia,~~ shall be presumed to be correct. *The applicant*

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence, ~~unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~

~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~

~~(3) that the material facts were not adequately developed at the State court hearing;~~

~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~

~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;~~

~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~

~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~

~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

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(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(e)~~*(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record

pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~*(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act,[2] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(I) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub. L. 104-132, § 104.)

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[2] 21 U.S.C. § 848.

§ 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE [Amended.]

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A or title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

> *(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or*
>
> *(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.*

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub. L. 104-132, § 105.)

No. 97-300

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that Mr. Martinez-Villareal's federal habeas corpus petition presenting only a claim of incompetence to be executed was not a "second or successive" application within the meaning of amended 28 U.S.C. § 2244(b) where the incompetency claim had been presented in an earlier petition but dismissed without prejudice as premature upon the insistence of the State of Arizona that the time and place to litigate it was in a subsequent petition like the one now in issue?

2. Did the court below err in considering, among the factors bearing upon its construction of the statute, the principles that statutes should be given a reasonable construction that avoids needless constitutional adjudication and absurd results?

3. Does this Court have *certiorari* jurisdiction to review the decision below and, if not, is there any sufficient cause for it to exert its extraordinary-writ power to relieve Arizona of the consequences of Arizona's own successful efforts to channel federal court consideration of Mr. Martinez-Villareal's incompetency claim into the present forum?

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals' panel in *Martinez-Villareal v. Stewart, et al.*, is printed at JA 179 and is reported at 118 F.3d 628 (9th Cir. 1997).

JURISDICTION

One of the questions which this Court granted certiorari to decide was whether it has jurisdiction to review this case. *See* Petitioners' Brief at i. As we discuss in Argument III below, pursuant to 28 U.S.C. § 2244(b)(3)(E) of the Antiterrorism and Effective Death Penalty Act of 1996, this Court does not have statutory certiorari jurisdiction over this case. Moreover, no reasons exist for this Court to employ an extraordinary writ to consider this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States, which provides in part:

> No person shall be . . . deprived of life . . . without due process of law . . .

The Fourteenth Amendment to the Constitution of the United States, which provides in part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

28 U.S.C. § 2243.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

. . .

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application

for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

. . .

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

. . .

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 2, Rules Governing Section 2254 Cases In The United States District Courts:

. . .

(d) a petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

STATEMENT OF THE CASE

Respondent Ramon Martinez-Villareal is a mentally retarded, mentally ill, brain-damaged Mexican citizen who has been sentenced to death by the State of Arizona

as an accomplice to a robbery during which two men were shot to death. Mr. Martinez-Villareal was represented at trial by William Rothstein,[1] who also represented him on direct appeal, *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985), and in his first state postconviction proceeding. During this state postconviction proceeding, a warrant was issued for Mr. Martinez-Villareal's execution, and he attempted to petition the U.S. District Court for federal habeas corpus relief and obtained a stay of execution from the district court. The State of Arizona successfully moved to dismiss each of Mr. Martinez-Villareal's federal habeas petitions on the grounds that they contained claims on which state remedies had not been exhausted. JA 8.

In late 1990, following the state court's denial of Mr. Martinez-Villareal's second postconviction proceedings, Sean Bruner was appointed by the U.S. District Court to represent Mr. Martinez-Villareal in his federal habeas petition. Mr. Bruner soon discovered that his client had been treated for schizophrenia with anti-psychotic medication by Arizona Department of Corrections physicians

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[1] The district court found that Rothstein's trial representation was constitutionally ineffective because he failed to investigate and present evidence of Mr. Martinez-Villareal's obvious mental deficiencies in mitigation of punishment. *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB, at 20-30 (D. Ariz. Oct. 21, 1994) (unpublished). That determination was reversed on procedural default grounds because the allegations had been omitted from the first state postconviction petition in which Mr. Martinez-Villareal was still being represented by Rothstein. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305-06 (9th Cir.), *cert. denied*, 117 S.Ct. 588 (1996).

since 1986. Mr. Bruner pursued several claims relating to Mr. Martinez-Villareal's impaired mental condition, including his lack of competence for execution. JA 7-11.

Mr. Bruner's first attempt to raise the competency for execution claim in federal court again met with a motion to dismiss by Arizona on the grounds that the claim was not exhausted. JA 8. At that time, and until 1993, Arizona statutes provided that only the warden of a correctional facility could initiate judicial proceedings to determine a prisoner's mental fitness for execution. Ariz. Rev. Stat. §§ 13-4021 *et seq.* (1978) (repealed 1993). The district court stayed the federal proceedings, and Mr. Martinez-Villareal's counsel returned to state court to exhaust this claim. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1304-1305 (9th Cir.), *cert. denied*, 117 S.Ct. 588 (1996). The Arizona courts refused to review the claim under the state's post-conviction rule, and the warden of the institution in which Mr. Martinez-Villareal was confined refused to initiate the statutory procedures despite Mr. Martinez-Villareal's history of mental illness in prison. JA 9.[2] Thereafter, on March 26, 1993, counsel for Mr. Martinez-Villareal filed an amended federal habeas petition raising,

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[2] Mr. Bruner petitioned for certiorari from Arizona's refusal to entertain the competency to be executed claim. Arizona urged this Court to deny review because, through his federal habeas petition, "[Mr. Martinez-Villareal] has ready recourse to a federal forum if reasonable efforts to exhaust his state remedies do not result in an outcome which he feels is satisfactory, so *there is no chance of him being executed without there being an opportunity for him to litigate his claim.*" *Martinez-Villareal v. State of Arizona*, No. 92-5373, Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 15 (emphasis added).

among other claims, his now exhausted but still unadjudicated claim that he was mentally unfit for execution. JA 112.

Counsel for Arizona asked the district court to dismiss the competence for execution claim without prejudice on the grounds that the issue was not ripe, arguing that "[o]nly if a warrant for [Martinez-Villareal's] execution issues, and if he still claims to be incompetent at that time, will there be a jurisdictionally sufficient case or controversy, and *that will be the time to litigate the issue.*" JA 6 (emphasis added). On behalf of Mr. Martinez-Villareal, Mr. Bruner responded that the state's position was inconsistent with its earlier claim that the competency issue was unexhausted. JA 8-9. Arizona responded that "to do a competency determination now would be futile, because it would certainly have to be repeated when the time for execution finally arrives." JA 19.

The district court conducted a hearing upon Mr. Martinez-Villareal's habeas petition, at which Mr. Bruner presented evidence of his client's mental illness. The district court found the evidence of mental incapacity persuasive, and granted the writ as to the death sentence on the ground that Mr. Martinez-Villareal's trial counsel had been ineffective in failing to discover and present such evidence at his sentencing hearing. *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB (D. Ariz. Oct. 21, 1994) (unpublished); *Martinez-Villareal v. Lewis*, 80 F.3d at 1305. Mr. Martinez-Villareal's other federal claims were rejected, except for the claim that he was mentally unfit for execution. On that issue, the district court accepted the position of the State of Arizona that the claim was not ripe for review, stating that "[t]his claim is premature and

is denied without prejudice." *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB, *supra*, p. 19.

Arizona appealed the district court's order granting sentencing relief on the ineffectiveness of counsel claim. The Ninth Circuit held on April 4, 1996, that the district court should not have reached the merits of that claim because it was procedurally defaulted when it was not raised in the first state postconviction proceedings where trial counsel continued to represent Mr. Martinez-Villareal. With respect to the competency for execution issue, the Court of Appeals stated:

> [T]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question.

Martinez-Villareal v. Lewis, 80 F.3d at 1309 n.1. Twenty days later, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Upon denial of certiorari in December, 1996, counsel for Arizona moved in the Arizona Supreme Court for a warrant of execution. Counsel for Mr. Martinez-Villareal promptly moved for a state competency hearing pursuant to the now amended Arizona statute.[3] Thereafter, on February 28, 1997,

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[3] Arizona states that Mr. Martinez-Villareal's counsel "finally" moved for a competency hearing, Petitioners' Brief, p. 3, as if counsel for Mr. Martinez-Villareal had not already attempted over Arizona's repeatedly successful objections to present his claim to every administrative official and state and federal court conceivably having jurisdiction over the matter.

the district court, in accordance with the mandate of the Ninth Circuit, entered an order providing that "Petitioner Ramon Martinez-Villareal's Claim 4.16 regarding competency to be executed is DENIED WITHOUT PREJUDICE." JA 20.

On March 12, 1997, counsel for Mr. Martinez-Villareal moved in the district court for reconsideration of the February 28, 1997 dismissal order, expressing concern that amended 28 U.S.C. § 2244 might be asserted by the State as a bar to raising the competency claim in a future federal habeas petition. Counsel noted that "in light of the understanding of all parties that petitioner's claim to incompetence to be executed would await a future hearing, it would be a cruel injustice to now find that petitioner's challenge was barred as a successive claim." JA 24. Counsel also advised the district court that this Court had recently granted certiorari in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), to consider the retroactivity principles applicable to the AEDPA.[4] *Id*. Counsel for Arizona gave the district court no indication that they intended to take the position that a subsequent petition raising the competency claim would be barred under amended § 2244. The district court denied reconsideration as unnecessary to preserve the claim:

> After considering Petitioner's arguments, the Court finds no reason to grant the requested

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[4] This Court later decided *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), holding that the AEDPA does not apply retroactively to habeas cases filed before the effective date of the AEDPA, on the same day that the court below filed its opinion allowing Mr. Martinez-Villareal to proceed with his unadjudicated competency claim. JA 179.

> relief. That particular claim could not even be construed as an unexhausted claim since it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the "incompetency to be executed" claim as a successive petition.

JA 25-26. Mr. Martinez-Villareal filed a timely notice of appeal from the district court's refusal to reinstate the habeas petition.

On the same day that counsel filed his motion to reconsider, March 27, 1997, the Arizona Supreme Court granted the State's earlier motion and issued a warrant ordering petitioner Stewart to execute Mr. Martinez-Villareal on April 16, 1997 – a date later rescheduled for May 21, 1997. JA 27. Thereafter, proceedings were conducted in the Arizona Superior Court on Mr. Martinez-Villareal's mental condition. After an expedited hearing in which counsel for Mr. Martinez-Villareal were able to present some, but not all, relevant evidence regarding Mr. Martinez-Villareal's mental condition,[5] Superior Court Judge Boyd T. Johnson concluded that "credible testimony and medical evidence was presented at the hearing herein that [Martinez-Villareal] may suffer from a mental illness, mental retardation and/or organic brain damage." JA 47.

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[5] Judge Johnson rejected the request of Mr. Martinez-Villareal's counsel for an assessment of Mr. Martinez-Villareal's mental retardation and brain damage, which his counsel argued was necessary to determine his mental capacity, especially with respect to his ability to connect the punishment of death with his conviction for murder. JA 33-34. *See Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in judgment).

However, Judge Johnson nevertheless found Mr. Martinez-Villareal competent to be executed under Arizona law. JA 48.

Counsel for Mr. Martinez-Villareal sought review in the Arizona Supreme Court challenging the fairness and reliability of the competency proceedings on several grounds, including the Superior Court's refusal to allow testing to assess the degree of mental retardation and brain damage, the constitutional inadequacy of Arizona's competency to be executed standard, and the insufficiency of the evidence to establish Mr. Martinez-Villareal's ability to understand the connection between his punishment of death and the crime for which he was convicted. The Arizona Supreme Court denied review on May 16, 1997, with two judges writing separately expressing concern about the propriety of Mr. Martinez-Villareal's execution in light of the fact that "the evidence makes it clear that [Martinez-Villareal] is mildly retarded and seriously mentally ill." JA 166.

Counsel for Mr. Martinez-Villareal moved to be appointed in the district court and sought expert assistance in the preparation and presentation of the now-ripe competency claim that remained unadjudicated at Arizona's request. JA 30-41. In response, Arizona for the first time asserted amended § 2244(b) as a bar to Mr. Martinez-Villareal's competency claim. JA 66. The district court, now believing that the AEDPA deprived it of jurisdiction to act, entered an order stating:

> Although this Court may not review the Petitioner's competency to be executed at this time, the Court recalls that it had the opportunity to observe the Petitioner in 1994. This Court can

> only state that its observations of Petitioner in 1994 called into serious doubt [Martinez-Villareal's] competence.

JA 104.

Counsel for Mr. Martinez-Villareal moved in the Court of Appeals for permission to proceed in the district court on his competency claim, presenting alternative grounds for permitting the district court to review the claim. Counsel argued that Mr. Martinez-Villareal had "not filed a second petition," but that this was "his first petition." JA 126. Counsel also argued that given the procedural artifice employed by the State to avoid any federal litigation of the competency claim, equitable principles required application of pre-AEDPA law to Mr. Martinez-Villareal's competency claim, citing *Burris v. Park*, 95 F.3d 465, 469 (7th Cir. 1996) (finding under similar circumstances an equitable exception to the 7th Circuit's determination in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *reversed*, 117 S.Ct. 2059 (1997), that the AEDPA is retroactive). JA 120-25. Counsel for Mr. Martinez-Villareal further argued that "[n]othing in the legislative history or text of [§ 2244] indicates an intent to divest federal courts of jurisdiction to enforce any right recognized under the federal constitution." JA 126. After this statutory construction argument, counsel suggested that interpreting § 2244(b) to bar Mr. Martinez-Villareal's competency claim under the unusual circumstances of his case "raises serious questions under the Suspension Clause." JA 128. On May 17, 1997, the Court of Appeals stayed Mr. Martinez-Villareal's execution and ordered accelerated briefing and oral argument, expressing preliminary concern with the Suspension Clause issue. JA 175-77.

Following briefing and argument, the court below based its decision on statutory grounds. It held that the prohibition of second or successive habeas petitions under § 2244 did not apply to Mr. Martinez-Villareal's competency claim. The court noted that Mr. Martinez-Villareal had diligently raised this claim in his first petition, but that "it was the State of Arizona that had suggested to the district court that Martinez-Villareal's competency claim was not ripe for adjudication." JA 181 n.1. The claim remained unadjudicated because the district court and Court of Appeals had concluded that it was premature when it was raised in the first federal habeas petition. Those courts had therefore rendered judgments preserving Mr. Martinez-Villareal's right to an adjudication of the issue when it became timely. JA 181.

Although the court below expressed concern that under the "narrow circumstances" of Mr. Martinez-Villareal's case, "the new statute poses a serious constitutional problem," it ruled:

> We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of section 2244.

JA 188. Referring to *In re Turner*, 101 F.3d 1323 (9th Cir. 1996), the court concluded that

> just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's

> federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as premature in order to ensure that such claims are likewise subject to federal review.

JA 191.

Thus, contrary to Arizona's assertion here, the suspension of the writ issue did not control the ruling below. Rather, the court focused on the statutory phrase "second or successive" petition in § 2244(b), and framed a narrow rule based upon the historical meaning of that concept:

> Our holding is a narrow one that is inherently limited by the unique nature of a competency claim. Indeed, we can think of no other situation where a first petition meets *Rose [v. Lundy]*'s exhaustion requirement but a claim raised by that petition must be tabled as premature. We extend *Turner* to this circumstance, and this circumstance only.

JA 193-94.

Since the competency claim was neither second or successive, it was not subject to the restrictions on such petitions imposed by § 2244(b). The Court of Appeals therefore dismissed "as unnecessary" Mr. Martinez-Villareal's motion for leave to file a habeas petition in the district court, and transferred the petition to the district court "pursuant to 28 U.S.C. § 2241(b)." JA 194.

One member of the panel, Judge T. G. Nelson, wrote separately, concurring in the result, and expressing his view that "the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed

claims." JA 194. Thus, the Suspension Clause issue on which Arizona seeks review in this Court was deemed controlling by only one member of the three-judge panel below.

SUMMARY OF ARGUMENT

The Court of Appeals below correctly interpreted the restrictions imposed upon "second or successive" petitions by amended § 2244(b) as inapplicable to Mr. Martinez-Villareal's competency to be executed claim that was diligently raised in his first petition and was not decided on the merits but was dismissed without prejudice as premature. Arizona's reading of this statute to bar the second of any two petitions filed by the same state prisoner – even where, as here, the later petition arises out of state proceedings postdating the earlier one and which the federal courts expressly refused to anticipate as unripe at the time of the first petition – is unreasoned, irrational, and inequitable. Neither Arizona nor any of its *amici* offers any real justification for construing the statute in this perverse manner, and there is none.

The arbitrary and unjustified interpretation which the State and its *amici* foist upon the statute is simply a subterfuge to let them make the arguments about the Suspension Clause which they are manifestly eager to press upon this Court although the present case provides no colorable occasion for adjudicating any Suspension Clause issue. This Court should decline the gambit, follow its usual, sensible rule against deciding serious constitutional questions needlessly, and give a sensible

construction to the "second or successive" language of amended § 2244(b), as did the court below. Such a construction will, quite properly, postpone consideration of Suspension Clause issues until some case genuinely puts them into controversy.

Compelling reasons also exist for this Court to decline jurisdiction over this case. Arizona concedes that this Court would have no jurisdiction to review the lower court's ruling if the State had prevailed, *see* 28 U.S.C. § 2244(b)(3)(E), but contends that this Court should exert jurisdiction to review the ruling because Mr. Martinez-Villareal prevailed. The statute and reason stand solidly against such a result.

ARGUMENT I

THE COURT BELOW PROPERLY HELD THAT A PETITION CONTAINING MR. MARTINEZ-VILLAREAL'S COMPETENCY CLAIM, WHICH HAD BEEN PRESENTED IN HIS FIRST PETITION BUT DISMISSED WITHOUT PREJUDICE AS PREMATURE, IS NOT A "SECOND OR SUCCESSIVE" CLAIM UNDER § 2244(b).

A. The phrase "second or successive" used in § 2244(b) demands construction and cannot have the absurd meaning Arizona claims is "plain".

Arizona and its *amici* go to great lengths to construct a Suspension Clause issue where none exists.[6] The most

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[6] In the court below, Arizona claimed that there was no Suspension Clause issue because of this Court's original jurisdiction. In its attempt to concoct a vehicle for its novel and complex Suspension Clause theory, Arizona has now admittedly reversed its position. Petitioners' Brief, p. 13 n.1.

conspicuous thing about all of their briefs is the absence of a single syllable explaining why the language of amended § 2244(b), "second or successive habeas corpus application," should be construed as applying to Mr. Martinez-Villareal's case and thereby raising the Suspension Clause issues that they argue elaborately for upwards of 70 pages.

Arizona begs the whole question of statutory construction and vaults into constitutional orbit by declaring that "the plain meaning of § 2244(b) as amended requires . . . [Mr. Martinez-Villareal's] new petition to be treated as successive," Petitioners' Brief, p. 12, and that the Ninth Circuit's "reconstruction of the statute," *id.*, p. 10, can be justified only by dragging the Suspension Clause into the case. Amicus Criminal Justice Legal Foundation ("CJLF") does the same thing. CJLF Brief, p. 7 ("The relevant statutory language in the present case is unambiguous." . . . "The Court of Appeals ignored the plain language of § 2244(b)."). Amici States similarly assume, with no explanation, that this is a "second" application case calling for radical Suspension Clause analysis. But the idea that Mr. Martinez-Villareal's present habeas application is a "second" one, or that the language "second or successive" in amended § 2244(b) has a *plain meaning* which is found by adding one plus one and making two, is either very naive or altogether disingenuous.

To see why, it is sufficient to observe that the same language, "claim presented in a second or successive habeas corpus petition" is used both to prohibit claims "presented in a prior application" by amended § 2244(b)(1) and to restrict claims "not presented in a prior application" by amended § 2244(b)(2). So, consider the commonplace situation of an individual who is convicted of a crime in state court, *successfully* challenges that conviction in a federal habeas corpus proceeding, is retried and reconvicted for the same crime, and files a new – and numerically "second" – federal habeas corpus application challenging this new conviction. Or consider the situation of an individual who is convicted in state court of a first criminal act, *X*, challenges that conviction in an unsuccessful federal habeas corpus petition, serves his or her time, commits a second crime after being released, is convicted of this new crime, *Y*, and files a new – i.e., numerically "second" – federal habeas corpus application challenging the conviction for *Y*. Are either of these cases of a "second or successive habeas corpus application" within the compass of § 2244? Whatever the answer to this question (to which we will return in a moment), it can hardly be derived from the "plain meaning" of § 2244(b) or one-plus-one mathematics. Nor does any supposed "plain meaning" of "second" speak "unambiguously" to such obvious cases as those of a prisoner who first files an unsuccessful federal habeas corpus petition challenging his state conviction for constitutional trial error and later files another federal habeas corpus petition challenging the constitutionality of a revocation of parole, *see, e.g., Morrissey v. Brewer*, 408 U.S. 471 (1972) – or of an arbitrary denial of a state-created right to

"good time" credit – on the sentence imposed upon the original state-court conviction. *See, e.g., Lynce v. Mathis*, 117 S.Ct. 891 (1997).

To decide each of these cases, a court must do exactly what the Court of Appeals below did: it must **construe** the statutory language "second or successive habeas corpus application" in a way that makes sense, considering the statutory wording, structure, and purpose – together, of course, with principles such as the canon preferring constructions that avoid raising grave constitutional questions[7]; it cannot simply incant "two applications by the same petitioner means the numerically second one is always out of court." And, a moment's consideration of that unavoidable question of statutory construction will reveal, for example, that "second" applications are routinely entertained where a defendant challenges multiple judgments of conviction or sentence,[8]

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[7] Arizona's brief seems to suggest that, in order to bring the canon into play, a court must first decide the constitutional question on the merits and then construe the statute to avoid reaching whatever result it has held unconstitutional. Petitioners' Brief, pp. 18-19. As the Court has said time and again, however, the canon cannot seriously " 'be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such a ruling was unnecessary. . . . ' " *United States v. CIO*, 335 U.S. 106, 121 n.20 (1948), *quoting United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-408 (1909). *See also, e.g., Blodgett v. Holden*, 275 U.S. 148, 148 (1927); *United States v. Jin Fuey Moi*, 241 U.S. 394, 401 (1916); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

[8] *See, e.g., United States v. Scott*, 124 F.3d 1328 (10th Cir. 1997) (on first § 2255 petition, court granted a new sentencing hearing and appeal; subsequent § 2255 petition challenging

or where the validity of a conviction and sentence has been upheld but, as in *Morrissey v. Brewer*, *supra*, a prisoner's parole is later denied or revoked in violation of the Constitution.[9] The "second" application challenging the new conviction, sentencing or parole revocation is not barred by § 2244(b) (or by the prior abuse of the writ doctrine, as the case may be) because the subject matter of the petition itself – the new conviction, sentence or parole violation – had not yet occurred and could not possibly have been challenged at the time of the earlier petition. Similarly, it would be absurd to deny a prisoner's "second" habeas petition in a case such as *Weaver v. Graham*, 450 U.S. 24 (1981), involving an ex post facto change in a prisoner's eligibility for release, because he

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effectiveness of trial and appellate counsel in those new proceedings was not a second or successive petition within § 2244); *Palmer v. Clarke*, 961 F.2d 771, 774 (8th Cir. 1992) (second § 2254 petition challenging third conviction and resulting sentence that had not yet occurred at time first petition was filed was proper); *Richmond v. Ricketts*, 774 F.2d 957, 960 (1985) (second § 2254 petition attacking constitutionality of resentencing that had not yet occurred at time first § 2254 petition was filed was proper).

[9] *See, e.g., Chambers v. United States*, 106 F.3d 472 (2nd Cir. 1997) (§ 2255 petition asserting challenge to conviction is not second or successive petition within § 2244 where earlier petition challenged Parole Commission's computation of sentence); *see also Thompson v. White*, 661 F.2d 103 (8th Cir. 1981) (prisoner's first habeas petition challenging conviction heard on the merits), *Thompson v. Armontrout*, 808 F.2d 28 (8th Cir. 1986) (same prisoner's second habeas petition challenging vindictive denial of parole granted), *Thompson v. Armontrout*, 926 F.2d 396 (8th Cir. 1991) (granting same prisoner's third habeas petition challenging parole board's subsequent refusal to grant credit for time served).

had filed an earlier application – before the release-eligibility – alleging constitutional error in his trial and sentencing.

Mr. Martinez-Villareal's petition is on the same footing. He raised his competency to be executed claim at the first opportunity he had: in the first habeas petition. There Arizona insisted and the federal courts held that the claim was premature and dismissed it without prejudice because the event that made the claim adjudicable, the issuance of an execution warrant, had not yet occurred.[10] This is no different from the situation of a "second" petition by the same prisoner raising challenges to new convictions or sentences, parole revocation, or denial of good time credits, which cannot be adjudicated until the occurrence of the later event that gives rise to the challenge. At the time Mr. Martinez-Villareal's counsel requested permission from the court below to file a second petition the subject matter of that petition had occurred: on the State's motion, the Arizona Supreme Court had issued a warrant to execute Mr. Martinez-Villareal while he is not mentally fit. JA 27, 109.[11] Just as

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[10] This was the very point Arizona itself made in its motion for summary judgment, requesting that the competency to be executed claim be dismissed as unripe because "[o]nly if a warrant for [Mr. Martinez-Villareal's] execution issues . . . will there be a jurisdictionally sufficient case or controversy . . . " JA 6.

[11] The habeas petition that the decision below permits Mr. Martinez-Villareal to file contains no challenge to the validity of his trial or sentence. It is concerned solely with the state proceedings that have taken place since his earlier federal habeas petition – the warrant of execution, issued by the Arizona Supreme Court on the State's motion, that ripened his

petitioners in cases such as *Weaver* and *Morrissey* can use a "second" petition to challenge administrative actions subsequent to their convictions that affect not the existence but the execution of their sentences, so too, can Mr. Martinez-Villareal now challenge his competency to be executed.[12]

The court below also analogized Mr. Martinez-Villareal's situation to cases in which previously "mixed" petitions, *see Rose v. Lundy*, 455 U.S. 509, 520 (1982), were refiled after exhaustion of state remedies. JA 188-89. *See Reeves v. Little*, 120 F.3d 1136, 1139 (10th Cir. 1997) (second petition raising claims following exhaustion is not "second or successive" within § 2244(b) where prior petition alleging state court delay in processing direct appeal was dismissed without prejudice); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) (second petition is not "second or

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competency to be executed claim, and the Arizona superior court order finding him competent for execution – which authorize the imminent executive action of putting him to death while he is incompetent. JA 27; *see McIntosh v. United States Parole Commission*, 115 F.3d 809, 811 (10th Cir. 1997) ("Petitions under § 2241 . . . attack the *execution* of a sentence, in contrast to § 2254 habeas and § 2255 proceedings, which . . . collaterally attack the validity of a conviction and sentence [citations omitted] . . . "; section 2241 attack "may challenge some matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters . . . ") (emphasis added).

[12] Mr. Martinez-Villareal's application for the writ alleges not only that he is incompetent to be executed but also that the state court order finding him competent for execution was unconstitutional because of procedural defects which resulted in an unreliable determination of the issue. *See Ford v. Wainwright*, 477 U.S. at 423-24 (Powell, J., concurring in part and concurring in judgment).

successive" under § 2244(b) where prior petition was dismissed without prejudice to exhaust state remedies); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996) (same). In those cases, like this one, the statutory language "second or successive . . . application" requires intelligent construction, not the wilful disregard with which Arizona and its *amici* would treat it under guise of a "plain meaning" that vanishes as soon as real cases are considered.

The fact is that "second and successive" has no "plain meaning" that can be read on an abacus, without reference to its statutory context. The language did not originate with the AEDPA. It was a familiar feature of the doctrine of abuse of the writ before 1996. *See, e.g. Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) ("[s]econd and successive federal habeas petitions present a different issue" because of possible manipulation); *McCleskey v. Zant*, 499 U.S. 467, 470 (1991) ("[t]he doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus"); Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. The courts did not imagine that it was susceptible of merely mathematical computation then. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314 (1996) (treating a federal habeas petition filed by an inmate as a first petition despite the two earlier next-friend federal habeas petitions reviewed in *Lonchar v. Thomas*, 58 F.3d 588 (11th Cir. 1995)); pre-AEDPA cases cited in notes 8 and 9, *supra*. Congress could not have imagined that it meant a numerically "second habeas application by the same person challenging any state court judgment or executive action whatsoever" rather

than a "second application by the same person challenging the same state court judgment" when it adopted the language in the AEDPA's amendments to § 2244(b). Nor could Congress have imagined any reasonable construction of the language "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application" (amended § 2244(b)(1)) and "claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application" (amended § 2244(b)(2)) which includes claims presented in the **only** petition in which a federal court is able to hear them at all.

B. Arizona's brief omits the fact that counsel's attempts to assert Mr. Martinez-Villareal's competency claim at the earliest possible time were frustrated by the State's successful efforts to avoid adjudication.

Arizona's position is based entirely upon the false premise that "Martinez-Villareal undeniably has already had one *fully-litigated* habeas petition . . . " Petitioners' Brief, p. 12. (emphasis added). To the contrary, in response to Mr. Martinez-Villareal's earlier petition, the State successfully urged the courts not even to begin to litigate the claim which is now in issue. JA 112-113.

The procedural history of Mr. Martinez-Villareal's competency to be executed claim recounted at pages 4-12 above illustrates why the Court of Appeals correctly found that this claim is not encompassed in Congress's prohibition of "second or successive" petitions. After Arizona had convinced the district court and Court of

Appeals that the claim was too early to decide in the first habeas application because an execution warrant had not yet issued, Arizona turned around and argued to these same courts that the claim was too late even though Mr. Martinez-Villareal's counsel at all times acted diligently and raised it at the first opportunity, and Mr. Martinez-Villareal was now under imminent threat of execution. The district court, after initially stating that it "ha[d] no intention of treating the 'incompetency to be executed' claim as a successive petition" under the AEDPA amendments to § 2244, reversed its position at Arizona's insistence, although apparently with some reluctance. JA 101-105.

The Court of Appeals, however, disagreed with the district court that the AEDPA should be construed to permit state officials to assert that a habeas petition is a "second" application barred by § 2244(b) when it is predicated solely on a claim which those state officials have successfully delayed by arguing that the claim was premature at the time of an earlier petition and had to be postponed in order to mature into a "jurisdictionally sufficient case."[13] This construction took Arizona's

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[13] Because of this unique history, Arizona could and should be held to have waived the right to assert a "second or successive application" defense against Mr. Martinez-Villareal's competency claim, even if that label could properly be attached to it. Certainly, the defense would have been held waived if the enactment of the AEDPA had not intervened; when Arizona asked that consideration of the competence to be executed issue be postponed, it knew it was giving up any argument that a later petition raising that issue should be deemed "second or successive" because that same phrase appeared in Rule 9(b). Section 2244(b) of the AEDPA could vitiate that waiver only if

earlier successful argument and the earlier explicit holdings of the federal district and circuit courts based

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the "second or successive application" defense it creates were jurisdictional and thus nonwaivable. Contrary to the position taken by the Amici States (p. 5-10), it is not.

As this Court said in *Felker v. Turpin*, 116 S.Ct. 2333, 2339 (1996), and as Arizona itself acknowledges, by its terms § 2254(b) places "restrictions on successive petitions," Petitioners' Brief, p. 16, rather than withdrawing jurisdiction to consider them. Its subsections do not purport to withdraw the judicial power to hear cases, but instead require that certain "claim[s] . . . shall be dismissed." 28 U.S.C. § 2254(b)(1), (2) and (4). That language resembles the terms of the other most common habeas defenses, nonexhaustion and procedural default: the exhaustion statute, 28 U.S.C. § 2254(b), says a noncomplying "application . . . shall not be granted"; the procedural default rule established by this Court's cases "bar[s] consideration . . . of federal claims that have been defaulted," *Trest v. Cain*, 117 S.Ct. 1517, 1522 (1997). This Court has held both of these defenses to be nonjurisdictional and thus waivable. *See Granberry v. Greer*, 481 U.S. 129 (1987) (nonexhaustion); *Trest v. Cain, supra* (procedural default).

Pre-AEDPA law similarly recognized that the "second or successive" petition defense could be waived. *Sanders v. United States*, 373 U.S. 1, 11 (1963). The AEDPA's restrictions on successive petitions are "well within the compass" of the pre-AEDPA law and thus " 'informed and controlled by historical usage, statutory developments, and judicial decisions.' " *Felker v. Turpin*, 116 S.Ct. at 2341, *quoting McCleskey v. Zant*, 499 U.S. 467, 489 (1991). Recognition of the similar historical context in which the exhaustion rule was codified was one of the factors that led the Court to hold that "though to be strictly enforced, [it] is not jurisdictional." *Strickland v. Washington*, 466 U.S. 668, 684 (1984), *citing Rose v. Lundy*, 455 U.S. at 515-520. If the issue were reached – which for the reasons explained above we submit it need not be – the same should be held with respect to the similarly-worded habeas defense at issue here.

upon that argument as its premise, and accordingly ruled that:

> Under our holding, a competency claim must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim – and only that claim – because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

JA 193.

As we shall see in the next section, this construction is most consistent with Congress's chosen statutory language and the statutory structure and history. It avoids difficult questions of the statute's constitutionality under the Suspension Clause. And it avoids the manifest absurdity and injustice of construing "second" so that a death-sentenced inmate with a serious claim of mental incompetence to be executed is told *first* that he is too early and "second" that he is too late.

C. The court below properly concluded that Mr. Martinez-Villareal's competency claim is not a "second or successive" application for habeas corpus.

This case involves an unusual circumstance in which a constitutional claim was diligently presented in an earlier petition for habeas corpus, but remained unadjudicated even though it was not subject to any defense of

procedural default or failure to exhaust state remedies. Its deferral was the result of the State's successful efforts to delay adjudication of the competency claim, arguing that "[o]nly if a warrant [of] execution issues . . . will there be a jurisdictionally sufficient case or controversy, and that will be the time to litigate the issue." JA 6. Thus, the court below was faced with a potentially valid constitutional claim, supported by credible evidence, but which remained unheard even though Mr. Martinez-Villareal's counsel had taken every step possible to assert and preserve this claim in state and federal court.[14]

The court below sensibly interpreted the words "second or successive" in 28 U.S.C. § 2244(b) as inapplicable to a later petition presenting only such a claim. Its interpretation is solidly supported by the statutory wording, structure, history, and purpose. By no reasonable construction can the term "second or successive habeas corpus application" in its statutory context be extended to embrace and extinguish Mr. Martinez-Villareal's claim of incompetence to be executed.

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[14] These circumstances distinguish *In re Medina*, 109 F.3d 1556 (11th Cir. 1996), and *In re Davis*, 121 F.3d 952 (5th Cir. 1997). Unlike the petitioners in those cases, Mr. Martinez-Villareal promptly filed his claim of incompetence to be executed at the earliest possible opportunity, in an initial federal habeas corpus petition where it was dismissed without prejudice. *In re Davis*, 121 F.3d at 955. Unlike Medina and Davis, Mr. Martinez-Villareal thus gave the federal courts (and Arizona) every timely and reasonable opportunity to join his attacks on his conviction and sentence with his attack on Arizona's administrative decision to proceed with his execution when he was mentally incompetent.

The court below properly began with the two basic ingredients of sound statutory construction: the text of the statute and a preference for reading it reasonably, so as not to "produce results that were not merely odd, but positively absurd." *United States v. X-Citement Video, Inc.*, 513 U.S. at 69. Although, as we have already seen, the phrase "second or successive" in § 2244(b) has no plain meaning in the sense of an unambiguous, self-evident application to every situation in which two or more federal habeas corpus petitions are filed, it does have a recognizable meaning that excludes the present case.

At the least, to constitute a "second" federal habeas petition on behalf of a person imprisoned under a state court judgment, there must be a second petition on the part of *the same person* attacking *the same judgment*. This much is implicit in the statutory text now.

- Subsections 2244(b)(1) and (2) as revised by the AEDPA both refer in terms to cognate § 2254 of title 28: The exact, identical language of both subsections is "second or successive habeas corpus application *under section 2254*." *See* Appendix A to Petitioners' Brief, pp. App. 1-2 (emphasis added).

- When enacting these revisions, Congress carried forward, unamended, the longstanding language of 28 U.S.C. § 2254(a) that states what a "habeas corpus application under section 2254" is: namely, "an application for a writ of habeas corpus in behalf of a person in custody pursuant to *the judgment of a State court*." *Id.*, at p. App. 5 (emphasis added).

- The language of the preface to subsection 2254(b)(1) – only slightly amended by the

AEDPA – and that of the almost totally rewritten subsections 2254(d) and 2254(e)(1) repeats this formulation virtually verbatim: They all talk about an "application for a writ of habeas corpus on behalf of [*or* by] a person in custody pursuant to *the judgment of a State court*." *Id.* at App. 5-6 (emphasis added).

- Logically, a "second" *anything* becomes identified as such only by sharing the defining characteristics of the first; and there is no suggestion in § 2254 that the "judgment of the State court" which is the subject of the kind of "habeas corpus application" it defines is less essential to the definition than the "person" filing the application.

So if, as *Lonchar* teaches, a petition by a different person is not a "second or successive habeas corpus application under section 2254," neither is a petition occasioned by a different state court judgment.

And this, of course, is what the courts have held, both before and after the amendment of § 2244(b) by the AEDPA. *See* notes 8 and 9, *supra*. Federal habeas petitions raising claims of incompetence to be executed are not addressed to the state court judgment of conviction and sentence but (depending on the local state procedure) to a state court determination of present competency or a state executive decision to go forward with the execution of an incompetent. *See* notes 11 and 12, *supra*. Hence it is not surprising that claims of incompetence to be executed have almost always been entertained in a federal petition filed after the denial of an earlier petition challenging the

underlying conviction and sentence – as in Alvin Bernard Ford's own case, *Ford v. Wainwright*, 477 U.S. 399 (1986).[15] But if Arizona's arguments below and to this Court are correct, the AEDPA's amendments to § 2244(b) changed all this without changing – and indeed while still explicitly referring to – statutory language ("application . . . in behalf of a person in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a)) that answers the question " 'second' what?" in a manner that makes the instant petition Mr. Martinez-Villareal's "first." And those amendments changed prior practice based on words that remain in the statute

- **not** in the service of "finality of determination" – the title of § 2244(b) – since there has never been **and never can be** any "determination" relating to the subject matter of the later habeas corpus application, the applicant's competence to undergo execution, and

- **not** to impose "on successive petitions . . . a modified res judicata rule, a restraint on . . . 'abuse of the writ' " – the aim of amended § 2244(b) as this Court correctly construed the amendment in *Felker v. Turpin*, 116 S.Ct. at 2340[16]

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[15] *See Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994), quoted by the court below at JA 193 n.7: "[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ."

[16] The stated purpose of the AEDPA is "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." Joint Explanatory Statement of the Committee of Conference, H.R.

– since there has never been **and never can be** any opportunity to adjudicate a claim of incompetence to be executed,[17] and since an applicant in Mr. Martinez-Villareal's circumstances has never done anything constituting abuse of the writ **and never can** do anything differently than he has done to present and preserve his claim of incompetence; and

• **not** to limit state prisoners to "one bite at the apple" – as Arizona itself describes the "intent" of the AEDPA, Petitioners' Brief, p. 12[18] – since an applicant in Mr. Martinez-Villareal's circumstances can never get even "one bite" at a claim of incompetence to be executed,

but because claims of incompetence to be executed **are inherently incapable of being presented in any federal habeas corpus petition that is not either too early or too**

Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996), reprinted in 1996 U.S.C. Cong. & Admin. N. 924, 244; *see also* 141 Cong. Rec. S7479-03 (daily ed. May 25, 1995) (statement of Sen. Hatch) (AEDPA prevents delay "while still preserving and protecting the constitutional rights of those who are accused").

[17] A " 'full and fair opportunity to litigate' the case . . . is a prerequisite to application of principles of res judicata. *Montana v. United States*, 440 U.S. 147, 153 (1979); accord, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971)." *Poyner v. Murray*, 508 U.S. 931, 933 (1993) (opinion of Souter, J., joined by Blackmun, J. and Stevens, J., respecting the denial of certiorari).

[18] *See also* 141 Cong Rec. S7663 (daily ed. June 5, 1995) (statement of Sen. Feinstein): "[T]his bill provides habeas petitioners with one bite of the apple. It assures that no one convicted of a capital crime will be barred from seeking habeas relief in Federal Court."

late. Nothing in the AEDPA remotely suggests that Congress meant the term "second" to categorically preclude the presentation of a previously recognized substantive federal constitutional claim in a **first** or **any possible** habeas corpus application, as Arizona's interpretation of the statute would do.

Further, to constitute a "second" federal habeas petition on behalf of a person imprisoned under a state court judgment, there must be a "first" petition in which the challenge to the judgment could possibly have been presented on the merits. The lower courts have held that the dismissal of an earlier petition without prejudice for reasons such as nonexhaustion does not operate to make a later petition a "second . . . application" under amended § 2244. *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996); *In re Turner, supra*; and *see Christy v. Horn* 115 F.3d 201 (3d Cir. 1997), all cited by the court below at JA 189; *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996); *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997). But whether or not that result should obtain in a case in which the reason for the dismissal of the prisoner's earlier petition was a matter within his or her control, it is the only intelligent construction of amended § 2244(b) in a case where the earlier petition was dismissed without a decision on the merits **and** without any fault or choice of the petitioner. *Cf. Lonchar v. Thomas, supra*. A fortiori, it is the only tenable result in a case like the present one, where Mr. Martinez-Villareal did everything possible to present his claim of incompetence in his initial federal petition and was denied the opportunity to have it heard on the merits because the State successfully contended that the claim was not yet

ripe and should be deferred for consideration in a subsequent proceeding. *Cf. Burris v. Park*, 95 F.3d 465 (7th Cir. 1996).

ARGUMENT II.

THE COURT BELOW MADE NO MISTAKE IN CONCLUDING THAT ONE CONSIDERATION FAVORING ITS CONSTRUCTION OF § 2244(b) WAS THE FACT THAT ARIZONA'S PROPOSED CONSTRUCTION OF THE STATUTE WOULD RAISE SERIOUS SUSPENSION CLAUSE ISSUES.

As we have seen, the decision of the court below turns on a reasonable construction of § 2244(b), independent of the Suspension Clause. But the court was also plainly right to take account of the "one doctrine more deeply rooted than any other in the process of constitutional adjudication . . . that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Specter Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

This Court has largely succeeded in avoiding the necessity for interpreting the Suspension Clause during more than 200 years, and the provision's interpretation poses a host of complicated and debatable issues. *See, e.g., Felker v. Turpin*, 116 S.Ct. at 2340; *Lonchar v. Thomas*, 116 S.Ct. at 1298; James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack On Habeas Corpus/Direct Review Parity*, 92 COLUM.L.REV. 1997, 2041-2072 (1992). The wisdom of the court below in steering wide of this constitutional *terra incognita* is demonstrated by the briefs of Arizona and its *amici* in this Court, the bulk of which are spent trying to answer difficult, abstract constitutional

questions not presented by the case.[19] And even these 70 pages of elaborate briefing manage to ignore or beg major questions that would have to be faced if the Court undertook to address the Suspension Clause issues which would arise on the hypothesis that Congress really did extinguish a forum for Mr. Martinez-Villareal's *Ford v. Wainwright* claim of incompetence to be executed. Arizona and its *amici*, for example, treat this subject as though it had to do entirely with federal habeas corpus in its most usual Twentieth Century office as a **postconviction** remedy, although, historically and analytically, a *Ford* claim has considerably less in common with postconviction review than with the older Anglo-American usages of the writ to remedy executive illegalities dependent on custody.

However this may be, the more fundamental point disregarded by Arizona and its *amici* is that their ranging constitutional arguments simply have no place in this case unless the Court is *first* compelled to conclude that the AEDPA cannot be read to avoid reaching constitutional issues of this magnitude. *United States v. X-Citement Video, Inc.*, 513 U.S. at 69. This does not mean, as Arizona

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[19] The CJLF brief enlarges on yet another theory not presented here: that a competency to be executed claim does not fall within the definition of "custody" for habeas relief. Unraised by any party to this case anywhere, at any time, that question, too, presents daunting issues that need not, and should not, be resolved now. It is enough to say that CJLF's argument would have to swim upstream. *See Ford v. Wainwright*, 477 U.S. at 427 (Powell, J., concurring in part and concurring in the judgment).

affects to believe, that the proponent of a particular statutory construction must first establish, or that this Court must first decide, whether any other construction of § 2244(b) would violate the Constitution. It means just the opposite: that the "Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided." *United States v. Locke*, 471 U.S. 84, 92 (1985). *See* note 7, *supra*. The court below correctly determined that the constitutional question could be avoided, and correctly avoided it.[20] That approach to the case was consistent with this Court's approach to previous cases in which Suspension Clause complexities lurked but were avoidable by reasonable statutory construction. *Sanders v. United States*, 373 U.S. 1, 11-12 (1963); *United States v. Hayman*, 342 U.S. 205, 223 (1952).

In addition to Suspension Clause concerns, the court below was concerned with the unusual, if not unprecedented, situation in which a habeas petitioner, whose conduct with respect to his competency claim was beyond reproach, could nevertheless be denied any opportunity for federal consideration of the claim if the AEDPA were applied and construed so as to upset the

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[20] Arizona also argues now – although it argued the exact opposite in the court below – that its interpretation of the § 2244(b) restrictions applies as well to this Court's original habeas jurisdiction. Petitioners' Brief, pp. 12-17. The State's manipulation of this unpresented issue is designed to undergird its next argument: that the suppositious § 2244(b) restrictions do not violate the Suspension Clause. As we have shown, *that* issue, too, is not presented.

expectations that underlay and resulted from the dismissal of his pre-AEDPA habeas petition without prejudice. Counsel for Mr. Martinez-Villareal particularly emphasized this concern. JA 124-125. In the wake of *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), it might have taken the form of the retroactivity analysis suggested by this Court's observation in *Lindh* that, while the AEDPA generally applies to habeas petitions filed after the Act's effective date, the invocation of specific provisions of the Act to defeat expectations settled by explicit court order before its enactment "may well . . . [raise] difficult issues, and it may be that application of *Landgraf*'s default rule will be necessary to settle some of them," *id.* at 2064.[21] However, the court below handed down its decision on the same day that this Court delivered the *Lindh* opinion, so it did not have that suggestion available. *See* note 4, *supra*.

In sum, a whole host of challenging constitutional questions could be injected into this case, and into cases that come after it, if Arizona's proposed construction of § 2244(b) were accepted. The court below wisely chose not to reach and decide those issues, because Arizona's statutory argument was not sufficiently persuasive to require it.

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[21] It might also have taken the form of holding that betrayal of the prior assurances given to Mr. Martinez-Villareal and his counsel by both the State and the courts would violate due process. *Cf. Raley v. Ohio*, 360 U.S. 423 (1959).

ARGUMENT III.

CONGRESS HAS PLAINLY WITHDRAWN CERTIORARI JURISDICTION OVER ARIZONA'S PETITION, AND THIS CASE PRESENTS NO EQUITABLE BASIS FOR INVOKING THIS COURT'S POWER TO ISSUE EXTRAORDINARY WRITS.

A. No Statutory Certiorari Jurisdiction Exists.

Arizona's certiorari petition presents this Court with a classic conundrum. On the one hand, it complains that the AEDPA bars the ruling of the court below allowing Mr. Martinez-Villareal to finally obtain an adjudication of his competency claim. If it is correct that § 2244(b) applies, then it is saddled with § 2244(b)(3)(E), which, unlike § 2244(b)(1), is very explicit. The statute states:

> The grant or denial of an authorization by a court of appeals to file a second or successive application . . . *shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.*

28 U.S.C. § 2244(b)(3)(E) (emphasis added).

Section 2244(b)(3)(E) defeats Arizona's attempted resort to certiorari twice over. On the one hand, Arizona argues that Mr. Martinez-Villareal's present application for habeas relief is a "second" application. The court below has ruled that the district court should consider this application. Arizona, therefore, is now asking this Court to review the Court of Appeals' grant of authorization for Mr. Martinez-Villareal to file what Arizona contends is a second application. The statute, however, provides that the "grant . . . of an authorization by a court

of appeals to file a second . . . application" shall not be reviewable.

Alternatively, looking at what Arizona asks this Court to do (rather than from the perspective of what the court below did), Arizona asks this Court to hold that the court below should have denied Mr. Martinez-Villareal authorization to file a second habeas application. The "denial of an authorization" is then "the subject of" Arizona's certiorari petition. Petitions on that subject, however, are expressly prohibited by the statute.

These conclusions are supported by additional considerations. First, had the court below ruled the way Arizona wanted it to, that ruling (a denial of authorization to file a second application) would plainly be covered by the statutory limitation and would not be subject to this Court's review. That was indeed exactly the situation in *Felker v. Turpin*, 116 S.Ct. at 2341, in which the Court dismissed the petition for writ of certiorari "for want of jurisdiction." By using the words "grant *or* denial," the statutory provision demonstrates Congress's intention that reviewability of a court of appeals' gatekeeper decision should not turn on which way the court of appeals rules. That is, it is not only denials of authorization (what Arizona sought) that are nonreviewable; grants are also not reviewable. Arizona concedes that if it had prevailed in the court below on the issue of Mr. Martinez-Villareal's authorization to file, that decision would not be reviewable in this Court. Petitioners' Brief, p. 47. In view of Congress's even-handed approach, it makes no sense to say that cases are not reviewable when the State prevails, but are reviewable when it does not.

Second, nonreviewability is supported by the evident congressional purpose in banning this Court's interlocutory review of gatekeeper decisions. Congress apparently wanted to speed up final disposition of successor petitions by having the court of appeals make a preliminary, nonreviewable interlocutory decision whether such petitions should be heard. If the court of appeals decides that a successor petition should not be heard, that is the end of it. If, on the other hand, it decides that a successor petition should be heard, then there is to be no delay caused by interlocutory review of that gatekeeper decision. The district court is to proceed to consider the habeas petition without having to wait for possible filing and disposition of a petition for certiorari by the State. If the court of appeals' gatekeeper decision was wrong, and if it results in habeas relief actually being given, the gatekeeper error can eventually be corrected by this Court's review of the ultimate habeas relief. Thus, this Court retains the power to cure gatekeeper errors when they actually lead to habeas relief while, at the same time, the Court is not burdened by – and the Court's certiorari jurisdiction does not serve to delay – proceedings in the large number of cases in which the courts of appeals' gatekeeper decision is correct. This result obtains even where a court of appeals decides, as the court below did here, that the § 2244(b) restrictions do not apply. Section 2244(b)(3)(E) "precludes . . . [this Court] from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court . . . ," *Felker v. Turpin*, 116 S.Ct. at 2338-39; and the decision below is "a judgment on an application

for leave to file a second habeas petition in district court." JA at 180.

Arizona's attempt to sidestep the application of this bar on the ground that Mr. Martinez-Villareal's motion was "dismissed" rather than "granted" or "denied" must fail. Congress's reasons for barring this Court's review of gatekeeper decisions are no different when a court of appeals holds that the § 2244(b) restrictions do not apply (because the petition is not successive) than when it holds that the standards do apply but the petitioner has met them. In both cases, interlocutory review would be equally burdensome and dilatory, and equally unnecessary since this Court will always have the opportunity to correct any gatekeeper errors if, and after, they result in relief being granted.

B. No Compelling Reasons Exist For An Extraordinary Writ.

The State's attempts to invoke this Court's power to issue an extraordinary writ should also fail. There is absolutely no cause for the Court to exercise its exceptional powers in this case.

Congress has precluded review of the courts of appeals' gatekeeper decision by certiorari. In the absence of compelling reasons, it would inappropriately circumvent that limitation to issue an extraordinary writ. What compelling reason does Arizona advance? It "desire[s] the district court to be prohibited from entertaining Martinez-Villareal's successive habeas petition." Petitioners' Brief, p. 48. This is exactly what Congress said this Court should not do when a court of appeals has granted leave

to proceed. Arizona inflates its desire by puffing it up with the rhetoric of "usurpation of judicial power." *Id.* This is the same hollow claim that underlies its efforts to turn the Court of Appeals' perfectly reasonable, unremarkable statutory construction into an occasion for unprecedented Suspension Clause adjudication.

Arizona never explains how it meets the first requirement of Supreme Court Rule 20, that the requested action sought through an extraordinary writ "must be in aid of this Court's appellate jurisdiction." Congress withdrew the Court's certiorari jurisdiction over gatekeeper decisions in the manifest belief that interlocutory review would not ordinarily be in aid of the Court's ultimate appellate jurisdiction over a habeas case, once a final judgment is rendered in the lower courts. Arizona does not say why that jurisdiction is not adequate to protect its interests.

Finally, Arizona's conduct in the underlying litigation disentitles it to the equitable relief that it seeks. The record reflects that counsel for Arizona is the person who originally sought bifurcation of the issues presented in Mr. Martinez-Villareal's prior habeas petition. JA 4-6. It was counsel for Arizona who persuaded the district court to delay ruling on Mr. Martinez-Villareal's competence until a later stage of litigation. In asking for an extraordinary writ, counsel for Arizona now seeks to enjoin the courts below from implementing the relief which Arizona itself requested and obtained – that "if a warrant for [Martinez-Villareal's] execution issues, . . . that will be the time to litigate the issue." JA 6. Since Arizona is entirely responsible for the procedural posture of the competency claim, it is not entitled to equitable relief from its own

doings. *See United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359 (1933) ("Although the remedy by mandamus is at law, its allowance is controlled by equitable principles").

CONCLUSION

For the foregoing reasons, this Court should decline jurisdiction in this case, or alternatively, affirm the judgment below.

Respectfully submitted,

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Dated: January 9, 1998

(14)

Supreme Court, U.S.
FILED
FEB 9 1998
OFFICE OF THE CLERK

No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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27 pp

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I

THE SUSPENSION CLAUSE ISSUE CANNOT BE AVOIDED BY RESORT TO AN ERRONEOUS THEORY OF STATUTORY CONSTRUCTION.

A. PLAIN MEANING OF "SECOND OR SUCCESSIVE." (RB 16-24.)

Loathe to engage the Suspension Clause issue, Martinez-Villareal focuses on statutory interpretation. His primary ploy is to erect a false dichotomy between "plain meaning" and "construction" of a statute. (RB at 16-24.) In their opening brief, Petitioners contended that "second or successive petition," as used in amended 28 U.S.C. § 2244(b), is so plain and unambiguous that "statutory construction" cannot be legitimately invoked to extend the limits placed on such petitions, creating an exception for incompetency for execution claims. Martinez-Villareal therefore erects a straw man, portraying Petitioners' view of the statute in simplistic mathematical terms, without reference to the full context. (*Id.* at 19, 23.) Because his approach produces unreasonable results, Martinez-Villareal insists that the idea that the statute possesses a plain meaning is itself unreasonable. Thus, he makes "plain meaning" interchangeable with absurdity and opposed to "construction," so that "construction" equates with reasonableness. Since the court of appeals innocuously labeled its rewriting of the statute "construction," Martinez-Villareal argues that that interpretation of the statute was reasonable.

However, correctly understood, there is no conflict between "construction" of a statute and that statute possessing a "plain meaning." Statutory "construction" is simply "the ascertainment of meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). Meaning can be "plain" even when recourse must be made to something other than the words immediately in question. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). Therefore, even determining that statutory language is so plain that no further interpretive steps are

permissible constitutes "construction," so "plain meaning" and statutory "construction" are not mutually exclusive.

Freed of Martinez-Villareal's false premise, it is easy to see through his attempts to becloud the "second or successive" terminology in ambiguity. His strategy is to generate hypotheticals that he asserts will have absurd results if decided in accordance with the plain meaning of the statute. He claims that his situation is indistinguishable from those hypotheticals, and concludes that the results in his case are statutorily unacceptable. (RB 18-24.) However, the strategy fails at each step. First, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, ___, 115 S. Ct. 552, 555 (1994). When Martinez-Villareal's hypotheticals are exposed to the light of the whole statute, the alleged ambiguities evaporate.

Martinez-Villareal posits a habeas applicant returning to federal court after a reconviction following a successful first petition, one seeking habeas relief from a second conviction occurring after an unsuccessful previous petition, one challenging a parole revocation after unsuccessfully attacking the original trial, or ones questioning denial of incarceration credits or changes to parole eligibility (like *Lynce v. Mathis*, 117 S. Ct. 891 (1997), and *Weaver v. Graham*, 450 U.S. 24 (1981)), as if there is ambiguity about the application of the statute in such situations, but there is none. (RB 18-21.) In the retrial, new charges, and parole revocation situations (and in the cases cited by Martinez-Villareal's footnotes 8 and 9), the claims raised in the second petitions stem from new proceedings, distinct from the original trials. Therefore, they obviously would be permitted: the claims were not presented in the first petitions because the new proceedings did not yet exist, and since "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," § 2244(b)(2)(B)(i) expressly allows such claims to be presented.

On the other hand, the results in *Lynce* and *Weaver* might be different if decided under the amended statute. Section 2244(b)(2)(B)(ii) permits relief only if the error claimed is such that "no reasonable factfinder would have found the

applicant guilty of the underlying offense," thus excluding claims that only implicate sentences. However, all this really tells us is that the grounds for relief under the amended statute are narrower than they were before the amendments, and limitation of habeas relief was the very purpose of Congress. Such narrowing is neither absurd nor an ambiguity in the statute – it is simply a policy decision that Congress was entitled to make, and did make, and made with unmistakable clarity. Does the preclusion of sentence-based claims in successive petitions mean that some potentially meritorious claims cannot be reviewed? Yes – but that is precisely the same situation that existed before habeas jurisdiction was expanded to include state prisoners in 1867, or after the 1966 habeas amendments (which "were intended by Congress as limitations on the exercise of that jurisdiction," *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981)), or after this Court itself prescribed limits on claims that could be considered, in *Stone v. Powell*, 428 U.S. 465 (1976), *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Teague v. Lane*, 489 U.S. 288 (1986). Someone is always left out when such a line is drawn, but that is the very purpose of drawing the line, and it does not make the line either ambiguous or absurd. Martinez-Villareal's real complaint is not that the statute lacks a plain meaning, but that the plain meaning excludes his sentence-based claim. However, such a policy choice is the domain of the legislative body, Congress, not the interpretive organ, the courts.[1]

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[1] Note 11 (RB at 21-22) and the NACDL brief (13-15) suggest that, because Martinez-Villareal wishes to challenge the "execution" of his death sentence, rather than the validity of his convictions or sentences, 28 U.S.C. § 2241 provides an independent source of authority for habeas relief, free of the constraints on a "successive habeas corpus application under section 2254" imposed by § 2244(b). However, Martinez-Villareal never argued in the district court that § 2241 is a separate source of habeas authority, thereby waving the claim. Further, the cases viewing § 2241 as such an independent source of authority all involve *federal* prisoners, looking for relief beyond the scope of § 2255, and no meaningful authority is offered that § 2241 has ever been utilized as an alternate source of habeas authority in a case involving a state prisoner.

This being so, it is clear that the other authorities relied upon by Martinez-Villareal do not help him. That he asserts "procedural defects" in the 4-day state-court hearing concerning his competence and invokes *Ford v. Wainwright*, 477 U.S. 399 (1986) (see RB 22 n.12), is irrelevant, because no issue of successive petitions was presented to this Court in *Ford* and because *Ford* was decided before promulgation of the express prohibition on sentence-related claims in § 2244(b)(2)(B)(ii). The court of appeals' reliance on the line of cases dealing with dismissal of "mixed" petitions, originating in *Rose v. Lundy*, 455 U.S. 509 (1982) (see RB at 22-23, 33) is also inapt: *Rose* was an interpretive choice by this Court concerning mixed petitions, permissible only because, in codifying the exhaustion doctrine, Congress had neglected to clearly address the issue. 455 U.S. at 516-18. That is worlds apart from this amendment, which precisely categorizes successive claims and then requires that they all be dismissed unless they fall within the carefully delineated exceptions established by § 2244(b)(2).[2]

Martinez-Villareal (and *amicus* ABA) contend that "second or successive petition" is a term of art, freighted with precisely the meaning given it in prior case law, so it cannot

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[2] The decisions from other courts of appeals relied upon by Martinez-Villareal and the Ninth Circuit (RB 22-23; JA 188-93), although purporting to apply the Act, are clearly distinguishable. First, not one of those decisions indicates that a sentencing issue was involved, so none had occasion to consider the implications of § 2244(b)(2)(B)(ii)'s express preclusion of such claims. Second, the whole line of cases originates in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996). However, *Camarano*'s refusal "[t]o foreclose further habeas review" applies only to cases where there has been "*no federal adjudication on the merits*" (*id.* at 46, emphasis added), and that appears to have been the situation in virtually all the cases following it. Here, by contrast, every issue except competence for execution was litigated for years and decided, so that even the concurring judge below could not conscientiously apply the "no adjudication" theory. (JA 195-95) Legal rules cannot properly be extended beyond the circumstances giving rise to them; "*Cessante ratione legis, cessat et ipsa lex.*" *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993).

be understood more restrictively when used in amended § 2244(b), particularly since the language still appears in Rule 9(b) of the Section 2254 Rules. (RB 23-24; ABA 8-12.) However, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect. . . . The reasonable construction is that the amendment was enacted . . . not just to state an already existing rule." *Stone v. Immigration and Naturalization Service*, 115 S. Ct. 1537, 1545 (1995). Congress could not have manifested its intent any more clearly when it eliminated the "not theretofore presented and determined" proviso in former § 2244(a), as well as the "not adjudicated on the hearing of the earlier application" and the "deliberately withheld the newly asserted ground or otherwise abused the writ" language of former § 2244(b). Because those terms are the content of Rule 9(b), accepting the argument would require this Court to act absurdly, treating the radical revision of § 2244(b) as if it never occurred.[3]

The theory that the Act, though eradicating former § 2244(b), intended to import the identical content back into the statute by nothing more than its use of the phrase "second or successive petition," subliminally incorporating Rule 9(b), is not only implausible, but was effectively rejected by *Felker v. Turpin*, 116 S. Ct. 2333 (1996). The Court recognized that, practically speaking, the Rule was amended by the requirement to obtain permission to file a second petition, which "transfers from the district court to the court of appeals a screening function that would previously have been performed by the district court as required by 28 U.S.C. § 2254 Rule 9(b)." 116 S. Ct. at 2340. Moreover, "[t]he Act *also*

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[3] *Amicus* ABA (9-10) suggests that the survival of Rule 9(b) signals that Congress considered it consistent with the rest of the Act, and left it untouched, with all the care it exercised in amending F.R.A.P. 22. In fact, the amendment to F.R.A.P. 22 is clumsy, being inconsistent with § 2253(c) about which judges can issue certificates of appealability, so it is quite likely that Congress simply neglected to remove from Rule 9(b) the language that was banished from former § 2244(b).

codifies some of the pre-existing limits on successive petitions *and further restricts* the availability of relief to habeas petitioners. . . . *The new restrictions on successive petitions* constitute a *modified* res judicata rule . . . *The added restrictions which the Act places on second habeas petitions* are well within the compass of this evolutionary process . . . " *Id.*, emphasis added. Thus, it repeatedly affirms that the Act is intended to go well beyond either Rule 9(b) or the previous jurisprudence of the Court, in restricting consideration of successive petitions.[4]

Martinez-Villareal ends this section with the conclusory assertion that Congress could not have imagined its language in § 2244(b)(1) and (2) would be interpreted to preclude "claims presented in the **only** petition in which a federal court is able to hear them at all." (RB 24, emphasis in original.) That, however, is exactly what the plain language contemplates. Thus, if there is a new rule of criminal law which either is not constitutional, or has not been made retroactive

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[4] Although Rule 9(b) is not expressly modified in the Act, it cannot thwart Congress' intent to fundamentally alter habeas law by revising § 2244(b). When enactments of equal dignity conflict, the one last in time governs. *Henderson v. United States*, 116 S. Ct. 1638, 1646 (1996). Repeals by implication will be recognized when the two acts are in irreconcilable conflict, or the later act covers the whole subject of the earlier one and is clearly intended as a substitute. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). Amended § 2244(b) addresses "second or successive" habeas petitions, the very same subject as Rule 9(b), but the provisions conflict irreconcilably: the Rule is permissive about dismissals ("may"), while the statute is mandatory ("shall"); under the Rule even the permissive dismissal based on prior presentation of a claim cannot occur unless there was a "prior determination on the merits," but § 2244(b)(1) requires dismissal of previously-presented claims regardless of how they were resolved; under the Rule claims that have not been presented before may be dismissed only if the judge finds "abuse of the writ," but the statute requires their dismissal unless they satisfy the sharply defined criteria set out in § 2244(b)(2)(A) and (B); and, as noted in the text, language virtually identical to the Rule was deleted from § 2244(b). Thus, Congress doubtless intended that successive petitions be dealt with under the statute, not the Rule.

by this Court, § 2244(b)(2)(A) precludes its consideration in a successive petition. *See, e.g., Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996), and *In re Vial*, 115 F.3d 1192, 1195-97 (4th Cir. 1997) (determined that *Bailey v. United States*, 116 S. Ct. 501 (1995), is neither a new rule of constitutional law, nor made retroactive by this Court to cases on collateral review, so it furnishes no basis for successive § 2255 petitions). If there is a claim based on previously undiscoverable facts, but it does not implicate constitutional error, or goes strictly to sentence, § 2244(b)(2)(B) precludes its consideration in a successive petition. *See, e.g., Bush v. Singletary*, 99 F.3d 373 (11th Cir. 1996) (successive § 2254 petition in a capital case based on claim of sentence disproportionality arising out of recent vacation of codefendant's death sentence precluded because federal constitution not implicated); *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997) (successive petition claiming ineffective assistance in capital sentencing precluded). Far from contradicting the intent of Congress, preclusion of such successive petitions is precisely what the amendment to § 2244 was designed to accomplish.

B. The State Did Not Waive the Right to Assert the Successiveness of Martinez-Villareal's Petition. (RB 24-27.)

Martinez-Villareal berates Petitioners for having first argued that his competency claim was not ripe for adjudication when it was first raised (which was plainly true), and then having asserted – after the passage of the Act – that the claim should be precluded, which sequence of events is contended to constitute a waiver of the "defense" of successiveness. Whether or not the new restrictions on successive petitions established by the Act are technically "jurisdictional," it is preposterous to argue that Petitioners "waived" the Act-based successiveness "defense" years before the legislation creating that "defense" was enacted. Martinez-Villareal offers no authority that a party can unintentionally waive a defense before it is ever created. This Court held in *United States v. Wells*, 117 S. Ct. 921, 926 (1997), that a good-faith change of litigation position, based on an unforeseen intervening change in the law, is "[n]othing the Government has done [that] disqualifies it from the chance to make

its position good in this Court." Martinez-Villareal's spurious waiver argument must be rejected.

C. Miscellaneous Arguments That Martinez-Villareal's Second Petition Should Not Be Deemed Successive. (RB 27-34.)

This patchwork of arguments is intended to support the court of appeals' view that Martinez-Villareal's second petition should not be deemed successive for purposes of the Act. The first several pages (27 to mid-30) merely reiterate how dreadful the State is, state in conclusory fashion that the court below was correct, and note some commonplaces about the text of the Act. Martinez-Villareal makes the illogical assertion that, "if, as *Lonchar* [*v. Thomas,* 116 S. Ct. 1293 (1996)] teaches, a petition by a different person is not a 'second or successive habeas corpus application under section 2254,' neither is a petition occasioned by a different state court judgment." (RB 30.) Of course, *Lonchar*'s facts (that relatives of a petitioner had previously attempted to file petitions on his behalf, which were dismissed when he opposed them) are totally different from this case. *Lonchar* did not concern the amended form of the habeas statute, and did not opine about the successiveness of petitions occasioned by different state court judgments, so it provides no support for Martinez-Villareal's position.

Martinez-Villareal attempts to use his idea that petitions based on different state court judgments can never be successive to explain why, in the past, competency for execution claims have not been dismissed as abuses of the writ. (RB 30-31.) This approach is transparently wrong because under the previous incarnation of § 2244(b), the criterion was not how many state court judgments were involved, but whether the second application was predicated on a "factual or other ground" excusably not adjudicated in the first petition. Furthermore, this approach "mixes apples and oranges," because "abuse of the writ" has been expurgated from the § 2244 lexicon. Whether Martinez-Villareal would have been found to have abused the writ under prior law is irrelevant to how the current law is to be understood; although a few phrases

were carried over, the operative language now is vastly different. "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended." *Brewster v. Gage,* 280 U.S. 327, 337 (1930).

The next several pages include a complaint that, because res judicata ordinarily requires a "full and fair opportunity to litigate" a matter before it is precluded, and Martinez-Villareal has not been able to litigate his competency claim in federal court, the Act should not be interpreted to preclude that claim (n.17 and text). However, the claim *was* fully litigated, in 4 days of state court hearings. Further, it is axiomatic that habeas corpus is not subject to the ordinary rules of res judicata. Finally, the Act's restrictions are a "*modified* res judicata rule," which not only "codifies some of the pre-existing limits on successive petitions" but also "further restricts the availability of relief." *Felker v. Turpin,* 116 S. Ct. at 2340 (emphasis added). Hence, Martinez-Villareal's reliance on res judicata is totally misplaced.

The real gist of Martinez-Villareal's argument seems to be that the nature of an incompetency for execution claim is such that it will always be either too early (not ripe) or too late (raised in a successive petition, after all the other claims have been litigated to conclusion), so that to apply the Act's prohibition against sentence-based successive petitions will mean it can never be addressed in habeas corpus proceedings. Presuming that, before there can be a second petition, "there must be a 'first' petition in which the challenge to the judgment could possibly have been presented on the merits," and that Congress could not have intended to thus preclude an entire class of claims, Martinez-Villareal concludes that such a reading of the statute is incorrect. (RB 32-34.)

Neither presumption is correct. First, this Court has repeatedly repudiated the idea that there is any absolute right to have a federal issue litigated in federal court. (Opening Brief at 43.) Second, even a casual reading of the Act reveals several places where Congress intentionally derailed whole classes of claims in addition to the prohibition of all sentence-based successive petitions. Relief is banned in first petitions for all law-based claims where the state court decision was

not contrary to or an unreasonable application of Federal law as determined exclusively by this Court. § 2254(d)(1). It is banned in first petitions for all fact-based claims where the state court determination was not unreasonable. § 2254(d)(2). It is effectively banned for most fact-based claims where the petitioner failed to develop the factual basis in the state courts, because he generally will not be afforded an evidentiary hearing in the federal courts. § 2254(e)(2). Finally, it is precluded on all claims that are not brought within the 1-year statute of limitations established by § 2244(d). Thus, there are numerous situations in which Congress plainly intended that a state inmate not be afforded even "a 'first' petition in which the challenge to the judgment could possibly have been presented on the merits."

The efforts of *amicus* American Bar Association to wring evidence of some other intent from the language of the statute are equally unavailing. ABA asserts that "presented" in § 2244(b)(1) actually means "raised and *determined* in a prior application," in the sense that it has been "adjudicated on the merits." (ABA 4-5, emphasis in original.) This contention blithely ignores several facts: (1) In common legal usage, to "present" does *not* indicate determination; it only means, "[t]o lay before judge, magistrate, or governing body for action or consideration; submit as a petition or remonstrance for a decision . . . " BLACK'S LAW DICTIONARY 1346-47 (rev. 4th ed. 1968). (2) "Determined" was removed from the only place it appeared in the text of the statute, § 2244(a). (3) That the section's title is "Finality of Determination" signifies nothing; "the title of a statute and the heading of a section cannot limit the plain meaning." *United States v. Minker*, 350 U.S. 179, 185 (1956). (4) "Determination" does *not* imply a decision on the merits, as opposed to some other conclusion of the matter. "A case or controversy is 'determined' when it is decided," *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 688 (1960), and a resolution on the merits is not necessarily implied here, because § 2244(d) contemplates dismissal simply for failure to meet a time limit. Thus, the statute does not require a prior decision on the merits before a petition is precluded as "successive."

In short, the problem is not that there is no plain meaning, but merely that Martinez-Villareal, his *amici*, and the court of appeals find the plain meaning unpalatable. The intent of Congress, manifested throughout the Act, was to severely limit the categories of claims that could be presented in habeas proceedings, in first as well as successive petitions, and the preclusion of sentence-based successive petitions in § 2244(b)(2)(B)(ii) is consistent with that intention. Therefore, the court of appeals was *not* free to subvert Congressional intent by "construing" the Act in a manner directly contrary to its plain meaning.[5]

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[5] This does not mean, however, that the whole issue can be sidestepped (as suggested by several *amici*) by saying that a *Ford* claim does not fall within the traditional concept of "custody," so that it should be resolved in a 28 U.S.C. § 1983 action rather than a habeas petition (an approached denounced by Martinez-Villareal himself, RB 35 n.19). First, Section 1983 was characterized as "a proper remedy for a state prisoner who is making a constitutional challenge to *the conditions of his prison life*," *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (emphasis added), but whether one is to be deprived of life (*i.e.*, have his "length of custody" ended) is not reasonably understood as a "condition of" prison life. In *In re Sapp (McQueen v. Patton)*, 118 F.3d 460, 463 (6th Cir. 1997), the Sixth Circuit rejected a challenge to execution by electrocution with the following ruling:

> McQueen's argument that his purported § 1983 action is simply a challenge to his "conditions of confinement" rather than to the sentence itself is unpersuasive. The prevention of the execution is itself an overturning of the sentence. McQueen was sentenced to death, not simply to a lifetime of litigating about death. Thus, this challenge is not equivalent to a simple "conditions of confinement" action, such as a claim that a prisoner's cell is too cold, though the prisoner doesn't object to being imprisoned in a warmer cell.

Second, *Ford*, of course, was itself a habeas action, and every case treating competency for execution has likewise been adjudicated through such proceedings. *See In re Davis*, 121 F.3d 952, 954-55 (5th Cir. 1997) (discussing cases). Moreover, even before passage of the Act, this Court made clear that § 1983 should not be utilized to avoid the limitations on successive habeas petitions, regardless of whether they raised claims

II

SINCE THE STATUTE IS UNAMBIGUOUS, THE SUSPENSION CLAUSE ISSUE CANNOT BE AVOIDED.

Martinez-Villareal makes vague assertions about the complexity of the issues that might be involved in this case and hypothetical future cases. (RB 34-37.) All this really means is that this case raises a significant constitutional dispute – *i.e.*, is the very sort of matter this Court was established to resolve – and constitutes no grounds for avoiding the issue.

Closer to a meaningful argument is Martinez-Villareal's reliance upon the line of cases, exemplified by *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), which indicates that constitutional issues should not be considered unnecessarily. However, Martinez-Villareal ignores his own quotation from *United States v. Locke*, 471 U.S. 84, 92 (1985), that the legitimate premise for declining resolution of a constitutional issue is that, "a construction of the Act is *fairly possible*" by which that can be done. (RB 36, emphasis added.) Where, as here, the Congressional intent in the statute is clear, "that finding renders the preference for avoiding a constitutional question inapplicable." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 n.9 (1996); *see also Swain v. Pressley*, 430 U.S. 372, 378 (1977) (clarity of D.C. Code provision claimed to violate Suspension Clause did not permit resort to statutory construction to avoid the constitutional issue).

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concerning executions. *Gomez v. U.S. District Court*, 503 U.S. 653 (1992); *Lonchar v. Thomas*, 116 S. Ct. at 1301. Finally, Congress' intention that claims concerning death sentences be handled *via* habeas is unmistakable – 21 U.S.C. § 848(q)(4)(B) only provides funds for "post-conviction proceeding[s] . . . seeking to vacate or set aside a death sentence" if brought "under section 2254 or 2255 of Title 28," and the Act's detailed new provisions for capital cases in Chapter 154 all contemplate habeas proceedings. Such clear intent by the author of both remedial processes must prevail, and *Ford* claims must be resolved through habeas proceedings.

The Court's abhorrence for treating a statute as "a nose of wax, to be changed from that which the plain language imports," under the pretense of avoiding a constitutional issue, *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926), was unanimously reemphasized this term, in *Salinas v. United States*, 118 S. Ct. 469, 475 (1997):

> "No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope. . . . " *United States v. Raynor*, 302 U.S. 540, 552 (1938). As we held in *Albertini, supra*, [472 U.S. 675] at 680,
>
> > Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 (1985).
>
> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. at 1124, "[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Id.* at n.9. *Gregory [v. Ashcroft*, 501 U.S. 452 (1991)] itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. See *Gregory*, 501 U.S., at 467. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue. *Ibid.*

"A constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily." *Edmond v. United*

States, 117 S. Ct. 1573, 1578 (1997). Section 2244(b)'s restrictions on successive petitions are so clear as not to brook an "interpretation" that magically creates a class of "non-successive" petitions exempt from those limitations. Therefore, this Court should resolve the Suspension Clause issue.[6]

III

THE *AMICUS* BRIEFS SUPPORTING MARTINEZ-VILLAREAL PROVIDE NO SUBSTANTIAL REASON TO DISAGREE WITH PETITIONERS' POSITION.

In addition to the foregoing, Petitioners contend that the remaining arguments by Martinez-Villareal's *amici* are unpersuasive.

A. NACDL. The primary argument offered by this *amicus* against applying § 2244(b) to preclude Martinez-Villareal's successive petition fleshes out a suggestion by Martinez-Villareal, that to do so will deprive him of due process by retroactively creating "new legal consequences," namely, "the outright extinction of respondent's right to secure plenary review of his *Ford* claim." (NACDL 7-9; RB 37.) However, this argument is fatally flawed because at no time before the passage of the Act did Martinez-Villareal actually *have* a "*Ford* claim." The claim was dismissed when presented in his earlier petition because it was premature, since he was not facing execution within the foreseeable future. *Martinez-Villareal v. Lewis*, CIV 86-296 TUC RMB, unpub. order of Oct. 21, 1994, at 18-19. Given the proverbial fluidity of mental states, "the issue of sanity is properly considered in proximity

[6] The urgency for decision of all the issues on which certiorari was granted is magnified by the lower courts' unbridled urge to create further exceptions to the statute whenever circumstances are deemed "unique," on the authority of the Ninth Circuit opinion in this case. *See United States v. Scott*, 124 F.3d 1328 (10th Cir. 1997) (ineffective assistance of counsel claims); *Ceja v. Stewart*, 1998 WL 23241 at *2-*5 (9th Cir. Jan. 20, 1998) (dissent urges review of claim that length of time on death row had created newly-ripe Eighth Amendment claim).

to the execution." *Herrera v. Collins*, 506 U.S. 390, 406 (1993). Hence, Martinez-Villareal possessed no cognizable "*Ford* claim" until March 12, 1997, when the Arizona Supreme Court issued a warrant for his execution, almost a year after the Act became law. (JA 27.) Before enactment, Martinez-Villareal possessed nothing more than a hope or expectation that he would be allowed to raise the competency claim in a successive petition.

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, *or upsets expectations based in prior law*. Rather, the court must ask whether the new provision attaches new legal consequences to *events completed before its enactment*.

Landgraf v. USI Film Products, 114 S. Ct. 1483, 1499 (1994) (emphasis added). The relevant event for purposes of a *Ford* claim is an *imminent* execution, and since in this case that event certainly post-dates enactment of the AEDPA, it is logically impossible to say that the Act is being applied "retrospectively" to Martinez-Villareal.[7]

2. ACLU. Martinez-Villareal himself having dodged the issue, the *amici* attempt to demonstrate that the Suspension Clause should be construed as protecting 200 years of unforeseen judicial and statutory accretions, rather than the limited common law writ familiar to the drafters (a claim rejected in *Denton v. Norris*, 104 F.3d 166, 167 (8th Cir. 1997)). ACLU begins (at 7) by disparaging Petitioners' brief as "a virtual download from a law review article prepared by a former

[7] This also disposes of NACDL's suggestion (brief at 12-13) that this case was properly returned to the district court pursuant to F.R.C.P. 60(b); no authority is provided that that rule is legitimately employed where a dismissed non-existent claim subsequently comes into being. In any event, the weight of authority in pre-AEDPA cases was that Rule 60(b) could not be used to avoid the "cause and prejudice" standard for successive habeas petitions. *See Bonin v. Calderon*, 999 F.2d 425, 428 (9th Cir. 1993) (listing cases). By parity of reasoning, it cannot be used to subvert the new restrictions on such petitions.

Justice Department lawyer nearly a half century ago," referring to Rex A. Collings, Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952). Unmentioned is the fact that Collings was a counsel for the Government in *United States v. Hayman*, 342 U.S. 205 (1952), in opposition to Paul Freund, whose views are heavily relied upon by ACLU at 11-13. Freund argued a theory that the universal understanding of the 1679 English Habeas Corpus Act as not applying to prisoners in execution of sentence resulted from a "misplaced parenthesis," supposedly bolstered by *Bushell's Case*, 124 Eng. Rep. 1006 (1607). The argument was implicitly rejected by the *Hayman* court's statement that, "at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive that confinement was legal [which] prevented issuance of the writ without more." 342 U.S. at 211. Although Freund's view was accepted in *Fay v. Noia*, 372 U.S. 391, 403-04 (1963), another mainstay of ACLU's brief, both points have been refuted by scholars in addition to Collings. *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1164-65 (1995); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 273-74 (1980); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 171 (1970); Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 461-68 (1966); Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. CHI. L. REV. 243, 262 (1965). Hence, neither Freund nor *Fay* should carry much weight with this Court.

Not to be outdone by its forbearer, the ACLU brief (14-16) presents its own singular theory, that when Congress creates lower federal courts pursuant to Article III, they instantly acquire inherent authority to issue habeas writs, in a manner equivalent to this Court's original jurisdiction. Since this tack runs aground on *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), ACLU (16-17) propounds that when *Bollman* spoke of the necessity for the power to issue the writ to be "given by written law," it referred to the Constitution as well

as to statutes. However, from its very first sentence, *Bollman* distinguishes between "the constitution or the laws of the United States." 8 U.S. at 93. Thus, the inquiry was, "whether by any statute compatible with the constitution of the United States, the power to award a writ of *habeas corpus* . . . has been given to this court." (*Id.* at 94.) This sentence is twice fatal to ACLU's theory: if habeas authority is bestowed directly by the Constitution, there is no need to consider whether there is a statutory basis for it (so the authority does come from statute, not the Constitution); further, even this Court gets its habeas authority by statute, so there is no "original" habeas jurisdiction here, let alone in the lower federal courts. Likewise, if the authority is "original" and direct from the Constitution, the rest of *Bollman*, with its careful statutory analysis, is pointless. ACLU's revisionist speculation that somehow the Court "overlooked" a Constitutional basis for habeas jurisdiction when it decided *Marbury v. Madison*, 5 U.S. (1 Cranch 137) (1803), and neglected to correct this oversight when directly confronted with the issue in *Bollman*, verges on the ludicrous. (ACLU at 17-18.)

Finally, ACLU (21-22) suggests that the basis for state prisoner habeas is the Fourteenth Amendment, rather than the statute of 1867. First, ACLU has its chronology wrong: Congress proposed the Amendment in 1866, the year before enacting the statute, but it was not ratified until July of 1868. Historical Notes, U.S.C.A. It makes no sense to say that there was a jurisdictional statute in place for more than a year before there was anything which could be adjudicated under it, and the historical evidence does not support the theory that the Act was intended to enforce the Amendment. Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 52-55 (1965); Forsythe at 1152. Moreover, by its own terms, the Amendment prohibits *states* from making or enforcing laws which abridge the privileges or immunities of citizens of the United States. This language has generally been understood to mean only that the states could not discriminate among their citizens, primarily to protect the emancipated slaves, who previously had not been deemed citizens. The "privileges and

immunities of citizens" were the benefits already bestowed by other provisions of the Constitution. JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 179-80 (1956). Thus, while the Amendment might be construed to prohibit *states* from suspending habeas corpus, it simply does not speak to Congress' ability to enlarge or reduce *federal* court habeas authority.

3. ABA. In addition to other matters previously dealt with, this brief (16-25) asserts that from 1789 to the present, Congress has always authorized federal review "as of right" for any prisoner with a federal constitutional claim, and that this is such an "established principle" that it should not be deemed to have been modified by the Act in the absence of a clearer statement of intent to do so. As indicated by its reliance on *Whitten v. Tomlinson*, 160 U.S. 231 (1895), a rather obscure case that does not support the proposition for which it is cited, this is an amalgam of arguments previously made by Gary Peller and James Liebman, which are thoroughly refuted in Forsythe at 1146-60. The argument is internally self-defeating, because it acknowledges that from 1789 until 1867 (during which habeas review of state prisoner cases was clearly precluded by the language of § 14 of the Judiciary Act), review by writ of error was also unavailable unless the federal question appeared on the "face of the record." Thus, every state prisoner with a federal constitutional claim was *not* entitled to some kind of federal review as of right during this period. The brief cites not a single statute or decision from this Court explicitly recognizing this supposedly permanent and paramount intention of Congress, nor does it address the Court's repeated explicit rejections of the idea that there is some general right to federal review. (Petitioners' Brief at 43.) In short, the contention is transparently untenable.

IV

THE COURT POSSESSES JURISDICTION OVER THIS CASE.

In both their certiorari petition and their first Brief on the Merits, Petitioners asserted that this Court possesses "statutory" certiorari jurisdiction over this case, despite the prohibition on certiorari review contained in § 2244(b)(3)(E), for two reasons. First, that prohibition, by its own terms, only precludes review of "[t]he grant or denial of an authorization . . . to file a second or successive petition," but the court of appeals was emphatic that it was neither granting nor denying permission to file a successive petition, instead dismissing "as unnecessary" the motion requesting permission, because in its view Martinez-Villareal was filing a "first" petition, for which no permission is required. (JA 194.) Martinez-Villareal acknowledges that the statutory language is "very explicit" (RB 38), but since a reasonable reading of that language shows that the prohibition on review does not apply to this case, he attempts to shift ground, and relies on this Court's shorthand reference to the statute as precluding review of "a judgment on an application for leave to file" a second petition. (RB 40-41, quoting *Felker v. Turpin*, 116 S. Ct. at 2339.) This ploy is plainly specious, because it is obvious that if a question of statutory interpretation arises, it is the text of the statute, not a precis of it, which must be analyzed. Since the statutory language does not encompass the judgment entered by the court of appeals here, the prohibition on review does not apply.

Second, in the opening brief (at 47) Petitioners pointed to previous cases in which this Court held itself not bound by prohibitions against review of specific determinations *under* a statute when the issue presented was the construction or constitutionality *of* the statute. Neither Martinez-Villareal nor NACDL (the only *amicus* addressing jurisdiction) even discuss them, tacitly conceding that the Court's jurisdiction on this basis is proper.

Since jurisdiction by "statutory" certiorari is certain, there should be no need to unravel the complexities of

extraordinary writ jurisdiction. However, Petitioners maintain that, if statutory certiorari is for some reason unavailable, jurisdiction exists pursuant to 28 U.S.C. § 1651(a), for the reasons discussed at length in the certiorari petition and their first Brief on the Merits. Once again, neither Martinez-Villareal nor NACDL so much as attempt to distinguish Petitioners' cases. Thus, it stands unrefuted that Petitioners are entitled to an extraordinary writ if statutory certiorari is unavailable, so there is no jurisdictional bar to the Court deciding this case.

CONCLUSION

The plain meaning of 28 U.S.C. § 2244(b)(2)(B)(ii) dictates that Martinez-Villareal's latest petition is indeed a successive petition, which must be precluded. Because it is evident that all the Suspension Clause protects is the kind of habeas corpus known to the Framers in 1789, the Clause presents no obstacle to enforcement of the AEDPA. Therefore, Martinez-Villareal's successive petition presenting his claim of incompetency for execution is precluded, and the court of appeals' order directing consideration of it must be vacated.

Respectfully submitted,

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MOTION FILED

SEP 17 1997

(3)

No. 97-300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY STEWART, Director,
Arizona Department of Corrections, et al.,
Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the limitations on second and successive petitions in 28 U. S. C. § 2244(b) apply to competency for execution claims?

2. Would applying the Act to prevent consideration of a claim of incompetency for execution, which is raised in a second or successive habeas corpus petition, constitute a violation of the Suspension Clause?

3. By what means can this Court review these issues?

4. Does a federal habeas court have subject matter jurisdiction to determine competency for execution?

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Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's evasion of the successive petition limits established by Congress is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 1997

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Fifteen years ago, Ramon Martinez-Villareal murdered Jim McGrew and Fernando Estrada.[1] He stated later that he killed them "because of his pure balls, that he was very macho." *State* v. *Martinez-Villareal*, 702 P. 2d 670, 673 (Ariz. 1985). He was convicted of these murders and sentenced to death. The Arizona Supreme Court affirmed. *Id.*, at 681, cert. denied *sub nom. Martinez-Villareal* v. *Arizona*, 474 U. S. 975 (1985).

Subsequent proceedings through April of 1996 are described in the Ninth Circuit's previous opinion, *Martinez-Villareal* v. *Lewis*, 80 F. 3d 1301, 1304-1305 (1996):

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

1. State post-conviction review (PCR), denied April 18, 1986.

2. State supreme court review of the denial, denied June 9, 1986.

3. A federal habeas petition, denied for containing unexhausted claims.

4. A second federal habeas petition, on which a stay of execution was issued June 10, 1986 to exhaust state remedies.

5. A second state PCR, denied July 12, 1988.

6. Review of the second state PCR denied by the Arizona Supreme Court.

7. Certiorari on the second state PCR, denied. *Martinez-Villareal* v. *Arizona*, 493 U. S. 874 (1989).

8. A third federal habeas petition, including for the first time a claim of incompetence to be executed, dismissed as unexhausted in 1991.

9. A third state PCR, denied August 13, 1991. The competency to be executed claim was denied on the ground that PCR was not the correct procedure for such a claim. See 80 F. 3d, at 1307.

10. Review of the denial of the third state PCR, denied April 7, 1992.

11. Certiorari on the third state PCR, denied October 5, 1992. *Martinez-Villareal* v. *Arizona*, 506 U. S. 893.

12. A fourth federal habeas petition, filed March 25, 1993.

The District Court then withdrew its prior dismissal orders, denied relief on the guilt phase, granted relief on the penalty phase, and held the incompetency claim to be premature. The Ninth Circuit affirmed on guilt and reversed on penalty, thereby reinstating the judgment. The competency holding had not been challenged on appeal. 80 F. 3d, at 1309.

13. This Court denied certiorari to review the Ninth Circuit's decision December 9, 1996. *Martinez-Villareal* v. *Lewis*, 136 L. Ed. 2d 517, 117 S. Ct. 588.

14. This year, Martinez-Villareal finally invoked the procedure established by Arizona for adjudicating competency claims, Ariz. Rev. Stat. Ann. §§ 13-4021 to 13-4024. After four days of testimony, the trial judge held he was competent. Combined Alternative Petition 2.

15. On May 16, 1997, the Arizona Supreme Court upheld this ruling. *Ibid.*

16. The same day, the federal district court denied Martinez-Villareal's motion to reopen the prior habeas proceeding, holding that such reconsideration was precluded by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 630 (CA9 1997) (*per curiam*).

17. On May 20, 1997, this Court denied certiorari to review the state competency holding. *Martinez-Villareal* v. *Arizona*, 137 L. Ed. 2d 1044, 117 S. Ct. 1840 (1997).

The present proceeding involves two applications. Martinez-Villareal moved in the Ninth Circuit for permission to file a successive habeas petition, 118 F. 3d, at 629, and presented an original habeas petition to Circuit Judge Nelson of that court. *Id.*, at 634. The Ninth Circuit panel dismissed the former as unnecessary and transferred the latter to the District Court. *Id.*, at 634-635.

Terry Stewart, Director of the Arizona Department of Corrections, respondent in the court below, has petitioned this Court for relief in several alternative forms, due to the uncertainty as to which form is appropriate and available in this situation.

SUMMARY OF ARGUMENT

Petitioner has thoroughly presented the compelling case for review of the judgment below. *Amicus* CJLF will therefore limit this brief to three points, each of which requires only a short discussion.

First, the order to be reviewed here is the Court of Appeals transfer of the original habeas application to the District Court, not its statement that permission to file in the District Court was unnecessary. The order to be reviewed falls within this Court's ordinary statutory certiorari jurisdiction.

Second, the decision below is not distinguishable from the Fifth Circuit's decision in *In re Davis*, filed after the filing of the present petition, on any rational basis. The ground on which *Davis* purported to distinguish the present case, that the inmate did not include a competency claim in his first petition, when it was unripe and could not be adjudicated, is a distinction without a difference.

Third, a claim of incompetency to be executed is neither a challenge to the fact or duration of custody nor an attack on the underlying judgment, and a federal court in habeas corpus lacks subject matter jurisdiction to adjudicate it.

ARGUMENT

I. Certiorari is an appropriate procedure to review the Ninth Circuit's transfer order.

Petitioner has requested several different modes of review of the Ninth Circuit's decision in this matter. Although the others are available if the Court deems necessary, *amicus* CJLF submits that the regular statutory writ of certiorari, 28 U. S. C. § 1254(1), is available and preferable.

As petitioner notes, see Combined Alternative Petition 21-22, the statutory prohibition on certiorari review of grant or denial of leave to file a successive petition is inapplicable. The

Court of Appeals neither denied nor granted the inmate's request, but declared permission unnecessary. *Id.*, at A-11; cf. 28 U. S. C. § 2244(b)(3)(E). The key point, though, is not the language of the opinion but the dispositive order of the Court of Appeals. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1003, n. 5 (1994).

> "[W]e dismiss as unnecessary Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court. *We transfer the petition* presented to Judge D. W. Nelson on May 30, 1997 (Docket No. 97-80249) to the district court *pursuant to 28 U. S. C. § 2241(b).*" *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 634-635 (CA9 1997).

The latter subsection reads: "The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination *to the district court having jurisdiction to entertain it.*" (Emphasis added.)

If 28 U. S. C. § 2244(b)(3)(A) applies and is jurisdictional, as petitioner contends, then the transfer order was unauthorized. Furthermore, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Federal Rule of Appellate Procedure 22(a) as follows:

> "RULE 22. HABEAS CORPUS ~~PROCEEDINGS~~ *AND SECTION 2255 PROCEEDINGS* [Amended.]
>
> "(a) Application for the Original Writ.—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application ~~will ordinarily~~ *shall* be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge ~~is not favored; the proper remedy is by~~ *shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code,* appeal to the *appropriate* court of appeals from the order of the district court denying the writ." (As amended Apr. 24,

1996, Pub. L. No. 104-132, § 103, 110 Stat. 1218, deleted language in ~~strikeout~~, added language in *italics*.)

If the second sentence applies and is jurisdictional, as *amicus* CJLF intends to argue if this case is accepted on the merits, neither Judge Nelson nor the Court of Appeals had jurisdiction to entertain the original writ petition at all. It should never have been filed.

Where no exception applies, this Court has jurisdiction to review via certiorari "[c]ases in the courts of appeals . . . (1) . . . before or after rendition of a judgment or decree." 28 U. S. C. § 1254; cf. *id.*, § 1257(a) (state courts, final judgments only). Certiorari jurisdiction thus turns on whether the case was "in" the Court of Appeals.

The first issue in this regard arises from the question of whether the case was *properly* in the Court of Appeals. That is, the successive petition limitations of the AEDPA are jurisdictional, and the court of appeals had no authority to act on a successive petition where their requirements were not met.

The rule on this issue is well settled. Where a lower court wrongly exercises jurisdiction, this Court has certiorari jurisdiction "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986) (quoting *United States* v. *Corrick*, 298 U. S. 435, 440 (1936)).[2]

The second issue deals with the distinction between an application filed with a circuit judge and one filed in the Court of Appeals. Jurisdiction to entertain original habeas writs lies with circuit judges, not courts of appeals. 28 U. S. C. §§ 2241(a), 2254(a). From the final order of the circuit judge, an appeal lies to the Court of Appeals. *Id.*, § 2253. Therefore, there is no certiorari jurisdiction to directly review the order of

2. *Corrick* referred to appeal, rather than certiorari, but *Bender* applied its principle to a certiorari case.

the circuit judge. 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, pp. 18-19 (2d ed. 1988).

In the present case, though, the Court of Appeals did not observe this distinction. The court, not the individual circuit judge, exercised jurisdiction over the petition and made the transfer order. The case was therefore treated by the Court of Appeals as being in that court, whether it was properly there or not.

Here again, the principle stated in *Bender*, *supra*, applies. Whenever the Court of Appeals exercises jurisdiction, rightly or wrongly, the case is "in" the court of appeals for the purpose of this Court's certiorari jurisdiction to review the jurisdictional question. The Court of Appeals' action of transferring this case to the District Court without the finding required by 28 U. S. C. § 2244(b)(3)(C) is reviewable in this Court on statutory certiorari under 28 U. S. C. § 1254(1).

II. The decision in this case is not distinguishable from the decision of the Fifth Circuit in *Davis* on any rational basis.

Petitioner has already briefed the conflict between the Eleventh and Ninth Circuits, a conflict acknowledged by the latter. See *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 632, n. 4 (1997). Since the filing of the petition, the Fifth Circuit has spoken on the question. Although the conflict is not as stark, the Fifth Circuit case is not distinguishable on any rational basis.

In re Davis, No. 97-00312, 1997 U. S. App. LEXIS 22736 (CA5, Aug. 27, 1997) was a motion for permission to file a second habeas application based on a claim that petitioner was incompetent to be executed. *Id.*, at *2-*3.

Davis held that 28 U. S. C. § 2244(b) applies to competency claims and barred Davis' claim. *Id.*, at *11-*13. This was so even assuming "that Davis is seeking to assert his *Ford* claim at the first properly available opportunity." *Id.*, at *12. *Davis*

also rejected the constitutional attack on the statute, following *In re Medina*, 109 F. 3d 1556, 1564 (CA11 1997).

Davis noted the decision in the present case but purported to distinguish it on the ground that Davis had not claimed incompetence to be executed in his first petition, a petition filed when execution was not imminent. 1997 U. S. App. LEXIS, at *7-*8.

This purported distinction makes no sense. "The law does not require the doing of a futile act." *Ohio* v. *Roberts*, 448 U. S. 56, 74 (1980). If *Davis* and the present case are both correct, then an inmate who files a pointless claim, which *must* be dismissed, *Martinez-Villareal*, 118 F. 3d, at 633, in his first federal petition gets a federal reconsideration of his competency later, while the inmate who quite properly declines to file a frivolous claim does not and is limited to state remedies. This cannot be right. Such a rule would be irrational.

While *Davis* may have avoided a head-on collision with the present case, the tension between the two opinions nonetheless calls for resolution on certiorari. Two opinions which reach opposite results on facts which make no rational difference create an anomaly in the law just as bad, if not worse, than an outright split of authority.

III. A habeas court lacks subject matter jurisdiction to review competency to be executed.

Questions of subject matter jurisdiction are not waivable and must be considered *sua sponte* if not raised by the parties. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982). The fact that a court exercised jurisdiction in a prior case without discussing the issue does not establish a binding precedent that jurisdiction exists. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63, n. 4 (1989); *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 97 (1994).

In *Fierro* v. *Gomez*, 77 F. 3d 301, 306 (CA9 1996), vacated on other grounds in *Gomez* v. *Fierro*, 136 L. Ed. 2d 204, 117 S. Ct. 285 (1996), the Ninth Circuit held that *method* of execution claims may be brought under 42 U. S. C. § 1983. That decision undercuts the exercise of habeas jurisdiction in a *competency* to be executed case.

The line between habeas and § 1983 has sharpened since *Ford* v. *Wainwright*, 477 U. S. 399 (1986). *Heck* v. *Humphrey*, 512 U. S. 477 (1994) and *Edwards* v. *Balisok*, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997) strongly imply that the two remedies are mutually exclusive. A challenge to the conviction and sentence must be brought in habeas, and until it is set aside, no action lies under § 1983 for a claim inconsistent with the validity of the judgment. *Heck*, 512 U. S., at 486-487; *Edwards*, 137 L. Ed. 2d, at 915, 117 S. Ct., at 1589.

The Ninth Circuit held in *Fierro* that method of execution claims are analogous to conditions of confinement claims and therefore may be brought as § 1983 actions, whereas habeas is appropriate "whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long." 77 F. 3d, at 305 (quoting *Young* v. *Kenney*, 907 F. 2d 874, 876 (CA9 1990)). If that is correct, a competency-to-be-executed claim does not fall within the habeas jurisdiction at all. Such a claim is neither an attack on the legality of custody, the subject of habeas at common law, see *Ex parte Watkins*, 3 Pet. 193, 202 (1830), nor a collateral attack on the criminal judgment, the typical function of the writ today. See *Felker* v. *Turpin*, 135 L. Ed. 2d 827, 840, 116 S. Ct. 2333, 2340 (1996).

However, it does not follow that every death row inmate could bypass state procedures and file his competency claim in federal court. Substantively, Justice Marshall's opinion in *Ford* is only a plurality in parts III, IV, and V. See *Ford*, 477 U. S., at 401. The controlling opinion is the one concurring in the result on the "narrowest grounds." See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Justice O'Connor's opinion in *Ford*

states expressly that inadequacy of state remedies is an essential element of Ford's case, 477 U. S., at 427 (opinion concurring in the judgment in part), and Justice Powell's opinion implies as much. *Id.*, at 427 (opinion concurring in part and concurring in the judgment).

Procedurally, while § 1983 suits are not subject to an exhaustion requirement, *Heck*, *supra*, 512 U. S., at 489, they are subject to the abstention doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971). As a general rule, federal courts do not enjoin ongoing state proceedings. *Id.*, at 45. Ongoing proceedings include execution of judgments. *Hill* v. *Martin*, 296 U. S. 393, 403 (1935) (under Anti-Injunction Act). The Full Faith and Credit Act applies to § 1983 actions, giving state court judgments the same preclusive effect as they would have in a subsequent action in state court. *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980); 28 U. S. C. § 1738.

Under this analysis, in any state which has an adequate procedure for determining competency, the federal courts would not interfere. They would either abstain under *Younger* or deny relief on the ground that one of the elements of the claim, inadequacy of state process, is missing. Once the state court determines, *with* due process, that the inmate is indeed competent, that finding would be res judicata, and again the federal court would not interfere. Federal intervention remains available as a last resort where there is no adequate state process. See, *e.g.*, *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973).

These are weighty jurisdictional issues of great importance. They involve matters of life and death, and they go to one of the most sensitive areas of relations between the state and federal courts. They are worthy of this Court's review.

CONCLUSION

A writ of certiorari should be granted.

September, 1997

Respectfully submitted,

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MOTION FILED
NOV 25 1997

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No. 97-300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY STEWART, Director,
Arizona Department of Corrections, et al.,
Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE IN SUPPORT OF THE PETITIONERS

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioners. Counsel for petitioners has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's evasion of the successive petition limits established by Congress transforms the issue of a prisoner's

competency to be executed into a tool for delay and needless relitigation. This is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests for leave to file its brief.

November, 1997

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

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RAMON MARTINEZ-VILLAREAL,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

SUMMARY OF FACTS AND CASE

Fifteen years ago, Ramon Martinez-Villareal murdered Jim McGrew and Fernando Estrada.[1] He stated later that he killed them "because of his pure balls, that he was very macho." *State* v. *Martinez-Villareal*, 702 P. 2d 670, 673 (Ariz. 1985). He was convicted of these murders and sentenced to death. *Id.*, at 672. The Arizona Supreme Court affirmed. *Id.*, at 681, cert. denied *sub nom. Martinez-Villareal* v. *Arizona*, 474 U. S. 975 (1985).

Subsequent proceedings through April of 1996 are described in the Ninth Circuit's previous opinion, *Martinez-Villareal* v. *Lewis*, 80 F. 3d 1301, 1304-1305 (CA9 1996):

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

1. State post-conviction review (PCR), denied April 18, 1986.

2. State supreme court review of the denial, denied June 9, 1986.

3. A federal habeas petition, denied for containing unexhausted claims.

4. A second federal habeas petition, on which a stay of execution was issued June 10, 1986, to exhaust state remedies.

5. A second state PCR, denied July 12, 1988.

6. Review of the second state PCR, denied by the Arizona Supreme Court.

7. Certiorari on the second state PCR, denied. *Martinez-Villareal* v. *Arizona*, 493 U. S. 874 (1989).

8. A third federal habeas petition, including for the first time a claim of incompetence to be executed, dismissed as unexhausted in 1991.

9. A third state PCR, denied August 13, 1991. The competency to be executed claim was denied on the ground that PCR was not the correct procedure for such a claim. See 80 F. 3d, at 1307.

10. Review of the denial of the third state PCR, denied April 7, 1992.

11. Certiorari on the third state PCR, denied October 5, 1992. *Martinez-Villareal* v. *Arizona*, 506 U. S. 893.

12. A fourth federal habeas petition, filed March 25, 1993.

The District Court then withdrew its prior dismissal orders, denied relief on the guilt phase, granted relief on the penalty phase, and held the incompetency claim to be premature. The Ninth Circuit affirmed on guilt and reversed on penalty, thereby reinstating the judgment. The competency holding had not been challenged on appeal. 80 F. 3d, at 1309.

13. This Court denied certiorari to review the Ninth Circuit's decision December 9, 1996. *Martinez-Villareal* v. *Lewis*, 519 U. S. ___, 136 L. Ed. 2d 517, 117 S. Ct. 588.

14. This year, Martinez-Villareal invoked the procedure established by Arizona for adjudicating competency claims, Ariz. Rev. Stat. Ann. §§ 13-4021 to 13-4024. After four days of testimony, the trial judge held he was competent. Combined Alternative Petition 2.

15. On May 16, 1997, the Arizona Supreme Court upheld this ruling. *Ibid.*

16. On June 23, 1997, the federal District Court denied Martinez-Villareal's motion to reopen the prior habeas proceeding, holding that such reconsideration was precluded by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 630 (CA9 1997) (*per curiam*).

17. On May 20, 1997, this Court denied certiorari to review the state competency holding. *Martinez-Villareal* v. *Arizona*, 520 U. S. ___, 137 L. Ed. 2d 1044, 117 S. Ct. 1840 (1997).

The present proceeding involves two applications. Martinez-Villareal moved in the Ninth Circuit for permission to file a successive habeas petition, 118 F. 3d, at 629, and presented an original habeas petition to Circuit Judge Nelson of that court. *Id.*, at 634. The Ninth Circuit panel dismissed the former as unnecessary and transferred the latter to the District Court. *Id.*, at 634-635.

Terry Stewart, Director of the Arizona Department of Corrections, respondent in the court below, petitioned this Court for relief in several alternative forms. On October 14, this Court granted the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The present case revolves around statutory language that is clear and should not be rewritten in the guise of interpretation. The canons of statutory construction, though useful for interpreting unclear statutes, are not needed when the relevant language is clear. Therefore, the Court of Appeals should not have ignored the plain language of the habeas statute in order to avoid an alleged constitutional problem with the statute.

The Suspension Clause, as originally understood, requires neither federal habeas for state prisoners nor habeas as a mechanism of collateral attack on judgments of courts of competent jurisdiction. The only colorable argument that it requires either today is the contention that this provision has somehow "evolved" to mean something different than it did when it was enacted. Whatever justification there may be for such constitutional evolution in other contexts, this notion should not be applied to the question of when, by whom, and how many times a criminal judgment should be reviewed. This decision has always been within the legislative power to make.

A habeas court lacks subject-matter jurisdiction to review a prisoner's competency to be executed. For state convicts, Congress has only authorized federal habeas to contest unconstitutional custody. An attack on competency to be executed contests neither custody nor the validity of the conviction or sentence, as it only addresses when the inmate is to be executed. Therefore, the prisoner does not deny the constitutionality of his custody, and habeas is unavailable.

Ford v. *Wainwright* does not establish habeas jurisdiction for competency claims. The issue was never addressed by this Court, and subject-matter jurisdiction cannot be conferred *sub silento*.

The line between habeas and 42 U. S. C. § 1983, the proper forum for competency claims, has sharpened since *Ford* v. *Wainwright*. *Heck* v. *Humphrey* and *Edwards* v. *Balisok* both demonstrate that habeas and § 1983 are not interchangeable.

Heck, *Edwards*, and *Preiser* v. *Rodriguez* establish the principle that an action that is cognizable under habeas cannot also be maintained under § 1983. The converse is also true. If an action is proper under § 1983, then it should not be maintained under habeas. This principle is further supported in various decisions of the circuit courts.

One of the strongest examples that habeas is not the proper forum for contesting competency to be executed is found in method-of-execution cases. Several circuits, most prominently the Ninth, have entertained § 1983 attacks on a state's method of execution, distinguishing habeas because the claim did not contest the validity or the length of the sentence. If method of execution is appropriate for a § 1983 action, then when the execution is to take place is equally subject to § 1983's jurisdiction.

The procedural differences between habeas and § 1983 make § 1983 the more practical forum for hearing competency claims. The Ninth Circuit found that the exhaustion requirement, the nature of competency claims, and the limits on successive petitions combined to make competency claims impossible to raise on habeas, if all procedures were followed. Instead of using this to justify rewriting the habeas statute, the Ninth Circuit should have understood that these facts pointed out that § 1983 was the superior forum for the prisoner's competency claim. Since § 1983 does not have an exhaustion requirement, and jurisdiction for a § 1983 action does not depend upon the timing of the habeas petition, § 1983 litigation may proceed in a more expeditious manner than under the Ninth Circuit's interpretation of habeas corpus.

The prisoner's remedy under § 1983 is both narrow and limited. An inadequate state remedy is a necessary component of any federal action under *Ford* v. *Wainwright*. None of the *Ford* opinions addressed whether the prisoner was actually competent to be executed. The case focused exclusively on the sufficiency of the state procedures for determining competency to be executed. The two concurring opinions, which provide

the controlling holdings of this case, recognize that inadequate state procedures are a requirement of any *Ford* claim.

Once a state provides the minimum necessary procedural guarantees, any finding that the prisoner is competent to be executed cannot be attacked in federal court. The abstention doctrine prevents federal courts from intervening before the resolution of any state competency proceedings. Once the state proceedings are concluded, res judicata and collateral estoppel will preclude competency from being relitigated in federal court.

There are strong policy reasons to leave the competency determination to the states. Competency is an inevitably inexact finding. When combined with the prisoner's overwhelming interest in avoiding execution, the possibility of endlessly frustrating litigation and relitigation is real. A proper reading of *Ford* minimizes these risks by leaving the decision to the states.

ARGUMENT

I. The statutory language is clear and should not be rewritten in the guise of interpretation.

The present case centers on statutory interpretation. Although statutory interpretation can be an arcane, rule-laden task, it does not have to be when the interpreting court is confronted with clear statutory language. Canons of construction and other devices may aid this Court in clarifying ambiguous statutory language, but cannot alter the plain meaning of an act of Congress. "We respect these canons, and they are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such 'interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature.' " *United States* v. *Monsanto*, 491 U. S. 600, 611 (1989) (quoting *United States* v. *Albertini*, 472 U. S. 675, 680 (1985)).[2]

The relevant statutory language in the present case is unambiguous. Section 2244(b)(2) states in the clearest terms the general rule against successive petitions and its narrow exceptions:

> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."

The Court of Appeals ignored the clear language of § 2244(b). Its ruling that exhaustion principles justify exempting competency-to-be-executed claims from § 2244(b)(2), see *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 632-634 (CA9 1997), cannot be justified by the statutory text. Section 2244(b)(2) prohibits presenting a previously unpresented "claim . . . ." It makes no distinction concerning the type of claim. The only exceptions, found in § 2244(b)(2)(A)-(B), do

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2. The fact that the present case is at least tangentially criminal does not change the analysis. The rule of lenity applies to "the substantive ambit of criminal prohibitions" and their penalties. *Albernaz* v. *United States*, 450 U. S. 333, 342 (1981). The limits on successive petitions in 28 U. S. C. § 2244(b) do not belong to either category.

not apply to competency-to-be-executed claims. See *id.*, at 631. There are no other exceptions. "Claim" means claim. "We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, *Congress said what it meant.*" *United States* v. *LaBonte*, 520 U. S. ___, 137 L. Ed. 2d 1001, 1010, 117 S. Ct. 1673, 1677 (1997) (emphasis added).

The Ninth Circuit justified its position with the maxim that courts should construe statutes to avoid " 'serious constitutional problems . . . .' " *Martinez-Villareal*, 118 F. 3d, at 632 (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988)). This rule cannot overcome the plain letter of an act of Congress. Therefore, "the Court will construe the statute to avoid such [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.*, 485 U. S., at 575. This is not an invitation to rewrite unambiguous statutory text. "The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is ' "not a license for the judiciary to rewrite language enacted by the legislature." ' " *Chapman* v. *United States*, 500 U. S. 453, 464 (1991); see also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 216-217 (1995) (declining to adopt unreasonable construction to avoid constitutional question).

The text of § 2244 cannot be ignored. If there is a constitutional problem, it must be met head on. Fortunately, this issue is easily addressed. The Ninth Circuit's concerns with § 2244(b)'s constitutionality are vastly overstated. Any constitutional attack on Congressional power to limit habeas corpus is spurious. See part II, *post*. The canon of construction invoked by the Court of Appeals is meant to avoid serious constitutional problems, see *DeBartolo Corp.*, 485 U. S., at 575, not spurious ones. Congress' unambiguous language should be enforced as written.

II. Congress has plenary authority to reduce or eliminate federal habeas for state prisoners.

The majority of the Court of Appeals panel thought there was a substantial constitutional question to be avoided by its extremely strained construction of the statute in question. *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 632 (CA9 1997). The concurring opinion went so far as to declare the statute unconstitutional. *Id.*, at 635 (Nelson, J., concurring in the judgment). These opinions are remarkable for their complete lack of any discussion of or authority for the supposed constitutional requirement.

Upon examination, the constitutional question vanishes. Congress has no obligation whatsoever to provide federal habeas relief for state prisoners. It has absolutely banned such relief before, and it could do so again. *A fortiori*, it can enact lesser limitations.

A. The Original Understanding.

The First Congress had this to say about federal habeas for state prisoners:

> "*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 82.

This Act "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument, and is contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888).

Between this Act and the present question, there are only three logical possibilities. Either (1) the Suspension Clause does not require habeas corpus in federal courts for state

prisoners;[3] (2) the state-prisoner limitation in the Act was unconstitutional; or (3) the limitation was constitutional when enacted, but the Suspension Clause has since "evolved" so that Congress could not enact the same statute today. To establish the first possibility, it is necessary only to refute the other two.

The contemporary understanding of the Suspension Clause rests not only on the clear wording of the Judiciary Act,[4] but also from the lack of controversy surrounding it. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 626 (1992) (Souter, J., concurring) (Alien and Sedition Acts, which were hotly contested, are not an authoritative guide to First Amendment). The high regard for the writ of habeas corpus at the time of the Constitution is well known. See, *e.g.*, The Federalist No. 84, pp. 511-512 (C. Rossiter ed. 1961) (A. Hamilton); L. Martin, Genuine Information (1788), reprinted in 3 The Founders' Constitution 328 (P. Kurland & R. Lerner eds. 1987); T. Jefferson, Letter to James Madison, July 31, 1788, reprinted in 1 The Founders' Constitution, at 476. It is simply inconceivable that a clear and blatant violation of a cherished right would have been enacted without controversy and uniformly enforced by the courts. Yet that is what happened with this provision.

Amidst the controversies that swirled around the Judiciary Act, section 14 was a calm pool of consensus. The section was enacted by the Senate from the first draft, with only one minor amendment relating to a different writ. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 95 (1923). The main debate in the House was

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3. Duker, after examining the history of the clause, concludes the original intent was just the opposite, "to restrict Congress from suspending *state* habeas for *federal* prisoners . . . ." W. Duker, A Constitutional History of Habeas Corpus 155 (1980) (emphasis added).

4. *Marbury* v. *Madison*, 1 Cranch 137 (1803) did, of course, hold a portion of the same act unconstitutional. That case, however, involved an application that was anything but clear from the face of the language and probably never occurred to Congress.

whether to create lower federal courts at all. See *id.*, at 123-131.

The state-prisoner limitation was invoked in *Ex parte Cabrera*, 4 F. Cas. 964 (No. 2,278) (CCD Pa. 1805). Cabrera was a secretary to the Spanish legation charged with forgery in state court in Pennsylvania. *Ibid.* He claimed diplomatic immunity, embodied in a federal statute. *Id.*, at 964-965. Justice Bushrod Washington, sitting as Circuit Justice, reluctantly decided the circuit court had no jurisdiction. *Id.*, at 965. First, he noted that the lower federal courts had no jurisdiction at all except what is conferred on them by statute. *Ibid.* There is no hint that a different rule applies to habeas corpus. Section 14 of the Judiciary Act was then clear and on point. *Id.*, at 966. Judge Peters concurred. *Id.*, at 965.

Justice Washington was a member of the *Marbury* Court and obviously aware of that then-recent decision. He could not have doubted his authority to declare this limitation unconstitutional if he thought it were. It seems that the constitutionality of the limitation was clear, whatever his doubts about its wisdom. See *id.*, at 966. Accord, *United States* v. *French*, 25 F. Cas. 1217, 1217 (No. 15,165) (CCD N.H. 1812).

The state-prisoner limitation was so well settled that it did not reach this Court for over 50 years. *Ex parte Dorr*, 3 How. 103 (1845) involved a defendant convicted of treason against the State of Rhode Island. He moved for an original writ of habeas corpus in the Supreme Court. *Id.*, at 104. The Court held it had no jurisdiction due to the state-prisoner limitation of section 14. *Id.*, at 105. "Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness." *Ibid.*

The validity of the state-prisoner limitation appears to have been universally acknowledged. *Amicus* has not found a single doubt expressed on the subject by any antebellum authority. See, *e.g.*, R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 154 (1st ed. 1858). Any

contention that the Suspension Clause required federal habeas for state prisoners at the time of the Founding would appear to be utterly unsupportable.

B. The "Living Constitution."

A law review article written in anticipation of the present legislation takes the position that the Suspension Clause forbids time limits on habeas corpus petitions by state prisoners collaterally attacking their convictions. Mello & Duffy, Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates, 18 Review of L. & Social Change 451 (1991). Yet even this partisan article has to admit that the clause as originally enacted applied only to federal prisoners. *Id.*, at 462. The only ground these authors can find to make their stand is the last redoubt of judicial autocracy: the "living Constitution." *Id.*, at 472.

The Suspension Clause is not the only provision of the Constitution at issue in this case. Article I, section 1 provides "All legislative powers herein granted shall be vested in a Congress of the United States . . . ." The capacity to make the policy choices at issue in this case was originally within the legislative power. By what means did it cease to be? The Constitution has not been amended to make that change.

Justices of this Court supporting broad federal habeas for state prisoners have repeatedly insisted that the Reconstruction Congress made that choice. See *Brown* v. *Allen*, 344 U. S. 443, 499 (1953) (opinion of Frankfurter, J.); *Fay* v. *Noia*, 372 U. S. 391, 417-418 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991); *Butler* v. *McKellar*, 494 U. S. 407, 427-430 (1990) (Brennan, J., dissenting). Assuming this to be true for the sake of argument, does a policy choice made in a time of grave national crisis forever bind future Congresses, so that policy cannot be adjusted to meet changing times? Particularly where the critical question is confidence in state courts, see *Butler*, 494 U. S., at 430 (dissent), the policy-

maker should be able to make adjustments as state courts grow more worthy of confidence.

To be sure, there are a few decisions of this Court that construe constitutional provisions to forbid practices that would clearly have been considered valid when those provisions were adopted. See, *e.g.*, *Bloom* v. *Illinois*, 391 U. S. 194, 210-211 (1968) (requiring jury trial for two-year contempt punishment); *Roe* v. *Wade*, 410 U. S. 113, 174-177 (1973) (Rehnquist, J., dissenting) (numerous abortion laws in effect at time of Fourteenth Amendment).

Whatever legitimacy such decisions may have in the realm of the most intimate personal decisions, see *Planned Parenthood* v. *Casey*, 505 U. S. 833, 852-853 (1992) (lead opinion), or in striking down practices acknowledged to be tyrannical even at common law, see *Bloom*, 391 U. S., at 198-199, n. 2, the issue of federal habeas for state prisoners is one of an entirely different character. It does not concern what acts will be legal or illegal. It does not concern what protections defendants will receive at trial or in subsequent proceedings. It concerns only when, by whom, and how many times that trial or proceeding will be reviewed, decisions which have always been within the legislative power to make.

The assertion has repeatedly been made that the constitutional mandate has "evolved" since the enactment of the Suspension Clause. See, *e.g.*, Mello and Duffy, *supra*, 18 Review of L. & Social Change, at 462. What is really sought here, however, is not evolution, but the Big Bang.

No decision of this Court holds that Congress has *any* obligation to extend federal habeas to state prisoners. The principal implication that it might is a dictum in a since-overruled case. See *Fay*, *supra*, 372 U. S., at 406.[5] There is no

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5. Not only is *Fay* an overruled case, but its historical dissertation has long since been discredited. See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 32 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 459 (1966).

historical, textual, or controlling precedential support for an argument that Congress has less than complete authority over these matters. Cf. *Carlisle* v. *United States*, 517 U. S. ___, 134 L. Ed. 2d 613, 626-627, 116 S. Ct. 1460, 1467-1468 (1996).

The history of federal habeas for state prisoners is not an evolution of a constitutional doctrine but the evolution of a statutory enactment.[6] That evolution has occurred through a combination of expansive decisions by this Court with Congress' failure to abrogate them. See *Wright* v. *West*, 505 U. S. 277, 305-306 (1992) (O'Connor, J., concurring in the judgment). But this Court's traditional reluctance to overrule its statutory construction precedents is premised squarely on the fact that Congress *can* abrogate them. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989). To say at this point that these decisions have been suddenly removed from the legislative power would be playing a constitutional shell game with the American people.

In *Wright* v. *West*, No. 91-542, the proponents of broad federal habeas vehemently asserted that the question belonged to Congress and not the judiciary. Brief of the American Bar Assn. as *Amicus Curiae* 7; Brief of American Civil Liberties Union as *Amicus Curiae* 2-3; Brief of Gerald Gunther *et al.* as *Amici Curiae* 53-55; Brief of Benjamin R. Civiletti *et al.* as *Amici Curiae* 29-30. The stalemate in that case effectively told the American people that the judiciary could not help them; those seeking justice for murder victims must turn to Congress to lift capital punishment out of the habeas quicksand. They

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6. A tortured argument for a constitutional mandate for federal habeas based on the Fourteenth Amendment can be found in Steicker, Incorporating the Suspension Clause: Is There A Constitutional Right to Federal Habeas Corpus for State Prisoners?, 92 Mich. L. Rev. 862 (1994). The argument founders on the text of the Amendment. It unequivocally obligates only the states, U. S. Const., Amdt. 14, § 1, and empowers Congress rather than limiting it. *Id.*, § 5. Steiker acknowledges this, and then goes off to attempt to justify his thesis *despite* the clear text. 92 Mich. L. Rev., at 898-899. This is, in effect, an admission that he is calling upon courts to rewrite the Constitution rather than enforce it.

did. It did. For this Court to do an about-face now and declare that these decisions are not within the legislative power after all would be a massive breach of faith with the American people.

Federal habeas for state prisoners was a subject entirely within the legislative power in 1789, and it remains so today. The Suspension Clause has no application to this case.

III. A habeas court lacks subject-matter jurisdiction to review competency to be executed.

For state convicts, Congress has authorized federal habeas "*only* on the ground that he is in *custody* in violation of the Constitution of the United States." 28 U. S. C. § 2254(a) (emphasis added). A prisoner's attack on his competency to be executed pursuant to a valid state conviction and sentence does not come within the subject-matter jurisdiction of federal habeas corpus, because the claim does not contest the constitutionality of his custody. Since he does not challenge the validity of his conviction or sentence, the prisoner is precluded from attacking his competency to be executed on federal habeas corpus. This does not leave the truly incompetent prisoner without recourse. A remedy under 42 U. S. C. § 1983 remains open to vindicate his Eighth Amendment interest in his competency to be executed. As *amicus* will demonstrate, this relief is narrow, and dependent upon the absence of adequate state procedures for determining his competency.

A. The Initial Question.

Subject-matter jurisdiction is indispensable to any litigation before any federal court. "Federal courts are courts of limited jurisdiction." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 701 (1982). Therefore, subject-matter jurisdiction "is an article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Id.*, at 702.

Important consequences flow from these principles. See *ibid.* Parties may neither consent to nor waive subject-matter jurisdiction, and estoppel principles do not apply to this issue. *Ibid.* Therefore,

> "a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. '[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' " *Ibid.* (quoting *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884)).

This Court should decide the subject-matter jurisdiction issue before any other issue. This case involves a substantial invasion of the state's prerogative in criminal law, enforcing the penalty for its most serious crime. As an order of a federal court is invalid without subject-matter jurisdiction, *Insurance Corp.*, *supra*, 456 U. S., at 701, a federal court should be particularly sure of its subject-matter jurisdiction before disrupting a capital sentence as in the present case.

The fact that in *Ford* v. *Wainwright*, 477 U. S. 399 (1986) this Court upheld a habeas petition on competency-to-be-executed grounds does not establish binding precedent that subject-matter jurisdiction exists. *Ford* only examined the propriety of state procedures; it did not address whether a habeas court had subject-matter jurisdiction to determine a prisoner's competency to be executed. See *post*, at 26-27. Jurisdictional issues are not decided *sub silento*; the issue is open until this Court directly confronts it. See *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63, n. 4 (1989); *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 97 (1994). It is now time to confront subject-matter jurisdiction.

B. No Jurisdiction.

When the prisoner attacks his competency to be executed, he does not attack the legality of his conviction or sentence. "Rather, the only question is not *whether*, but *when*, his execution may take place." *Ford*, *supra*, 477 U. S., at 425 (Powell, J., concurring in part and concurring in the judgment) (emphasis in original). This distinction removes the prisoner's action from habeas corpus jurisdiction and places it within the subject matter of the federal civil rights statute, 42 U. S. C. § 1983. Although not stated expressly by this Court, this principle follows from its cases distinguishing habeas and § 1983, and from lower court decisions that demonstrate an understanding of this distinction.

1. Heck and Edwards.

In the years since *Ford* v. *Wainwright* was decided, the line between habeas and § 1983 has sharpened. *Heck* v. *Humphrey*, 512 U. S. 477 (1994) was decided "at the intersection of the two most fertile sources of federal-court prisoner litigation— . . . 42 U. S. C. § 1983, and the federal habeas corpus statute . . . ." *Id.*, at 480. Petitioner Heck was convicted of voluntary manslaughter. While his appeal was pending, Heck filed a § 1983 action for money damages against several local prosecutors and a state police investigator, alleging improper investigation leading to his arrest, the knowing destruction of exculpatory evidence, and using an improper voice identification procedure at trial. *Id.*, at 478-479. The action did not ask for injunctive relief or release from custody. *Id.*, at 479.

Petitioner's case touched on two very different actions. Both § 1983 and habeas "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation." *Id.*, at 480. Thus, while exhaustion of state remedies is a prerequisite to federal habeas corpus, see *Rose* v. *Lundy*, 455 U. S. 509, 510 (1982), § 1983 does not require exhaustion, even when a state prisoner is the plaintiff. See *Heck*, 512 U. S., at 480. Since

Heck did not ask to have his sentence vacated or conviction overturned, the rule of *Preiser* v. *Rodriguez*, 411 U. S. 475, 489-490 (1973), that habeas was the exclusive remedy for such claims, was not squarely on point. See 512 U. S., at 481.

Preiser did not create an exhaustion requirement for certain § 1983 actions: "it merely held that claims by state prisoners are not *cognizable* under that provision, and must be brought in habeas corpus proceedings, which do contain an exhaustion requirement." *Ibid.* Furthermore, in dictum the *Preiser* Court stated that a prisoner who only sought damages would never have to exhaust state remedies before filing the § 1983 action. *Ibid.* Yet the real differences between habeas and § 1983 led the *Heck* Court to abandon the *Preiser* dictum when the damage claim rests on a claim that the prisoner's conviction is invalid. See *id.*, at 481-482.

The *Heck* Court did not have to create an exhaustion requirement in order to depart from the *Preiser* dictum. It instead turned back to *Preiser*'s original premise, and found no jurisdiction to rule on the substance of petitioner's claims.

> "The issue with respect to monetary damages challenging conviction is not, it seems to us, exhaustion; but rather, the same as the issue was with respect to injunctive relief challenging conviction in *Preiser:* whether the claim is cognizable under § 1983 at all. We conclude that it is not." *Id.*, at 483.

Heck still had the means for obtaining relief. He first had to successfully set aside his conviction before he could bring his § 1983 action. *Id.*, at 486-487. This sharpened the line between § 1983 and habeas corpus. Section 1983's tort action is not a proper vehicle for attacking criminal judgments. See *id.*, at 486.

The division between habeas corpus and § 1983 was reinforced in *Edwards* v. *Balisok*, 520 U. S. ___, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997), which extended *Heck* to § 1983 suits challenging the deprivation of good time credits. Edwards filed a § 1983 action for damages, claiming that the use of improper procedures deprived him of due process. *Id.*, at 912,

117 S. Ct., at 1586. He did not claim that the decision depriving him of the credits reached a wrong result. *Ibid.*, 117 S. Ct., at 1586-1587. The Ninth Circuit held that this substance/procedure distinction was sufficient to distinguish *Heck*. *Id.*, at 913, 117 S. Ct., at 1587.

The *Edwards* Court gave *Heck* its properly broad, natural reading. If "the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment," *ibid.*, then *Heck* applied, and the underlying judgment had to be overturned before any § 1983 action. Allowing the mere implication of an attack on the validity of a sentence to remove an action from § 1983 underscores the sharp distinction between § 1983 and collateral attacks on convictions in habeas corpus.

Edwards and *Heck* clarified and expanded the principles set forth in *Preiser* v. *Rodriguez*. *Preiser* held that habeas was the exclusive remedy for a state petitioner challenging the fact or the duration of his confinement, in spite of the broad language of § 1983. See 411 U. S., at 488-490. While *Preiser* established some separation between habeas and § 1983, the distinction was not always clear. *Preiser*'s line between habeas and § 1983 was considerably less clear where damages, and not release from confinement, was concerned. See *id.*, at 494; *Heck*, 512 U. S., at 481-482. *Heck* clarified and reinforced the distinction between habeas and § 1983 by refusing to follow this dictum. See 512 U. S., at 482. The *Preiser* Court saw its holding as limited to actual attacks on the duration or legality of confinement. *Heck* and *Edwards* expanded *Preiser*'s limits to a much larger universe.

Preiser, *Heck*, and *Edwards* all deal with matters where habeas is the proper remedy to the exclusion of § 1983. The logic of these cases applies with equal force in the opposite direction; there are many actions for which § 1983 is the proper vehicle to the exclusion of habeas corpus. As *Preiser* noted, habeas is much more specific and narrow than § 1983. *Preiser*, 411 U. S., at 489. While the scope of habeas has expanded

considerably from its original bounds, it is still true that a habeas petitioner's "grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement." *Id.*, at 486. While habeas may have been extended to challenge "less obvious restraints," *id.*, at 486, n. 7, it is still tethered to its historic core function. "But those cases marked no more than a logical extension of the traditional meaning and purpose of habeas corpus—to effect *release* from illegal custody." *Ibid.* (emphasis added).

Any relief other than release from illegal custody must be found from a source other than the writ. Thus damages are not available on habeas corpus. See *id.*, at 494. The narrow, specific habeas corpus and the broad, general § 1983 are best viewed as mutually exclusive remedies; relief that is available under one is not available under the other.[7]

The distinction between habeas and § 1983 is both real and important. The two actions operate under very different procedural regimes. Habeas contains procedural barriers designed to preserve the integrity of state justice systems, such as the exhaustion requirement. See *id.*, at 491. Section 1983 also has its own requirements, such as res judicata, which applies with less strength on habeas corpus. See *id.*, at 497; but see 28 U. S. C. § 2254(d) (increased, but not complete, res judicata effect for prior state determinations).

2. Method of execution.

Ironically, one of the strongest demonstrations that habeas is not the proper forum for contesting competency to be executed comes from the Ninth Circuit. In *Fierro* v. *Gomez*, 77 F. 3d 301, 306 (CA9 1996), vacated on other grounds in *Gomez*

7. The *Preiser* Court noted that prison conditions might be challenged under both § 1983 and habeas. See *id.*, at 499. The present case does not involve this doubtful dictum. Preiser's characterization of habeas as limited, narrow and exclusive remains as true today as it did then.

v. *Fierro*, 519 U. S. ___, 136 L. Ed. 2d 204, 117 S. Ct. 285 (1996), the Ninth Circuit held that *method* of execution claims may be brought under 42 U. S. C. §1983. This necessarily undercuts the exercise of habeas jurisdiction in a *competency*-to-be-executed case.

In *Fierro*, the state claimed that habeas was the exclusive method for challenging method of execution. 77 F. 3d, at 304. The Ninth Circuit's rejection of this argument illuminates the proper line between habeas corpus and 42 U. S. C. § 1983 actions.

> "Our court has defined the appropriate situation in which to seek habeas relief as 'whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long.' *Young v. Kenny*, 907 F. 2d 874, 876 (9th Cir. 1989), *cert. denied*, 498 U. S. 1126, 111 S. Ct. 1090, 112 L. Ed. 2d 1194 (1991). Plaintiffs here do not allege that their sentences are invalid. Nor do they allege that their sentences are unconstitutionally long. They seek only to prevent their executions by lethal gas." *Id.*, at 305.

As the *Fierro* Court found methods of execution analogous to challenging conditions of confinement, *ibid.*, there was no reason to transform plaintiffs' claim into a habeas petition. See *id.*, at 306. Other circuit courts have also entertained § 1983 actions attacking method of execution. See *Ingram* v. *Ault*, 50 F. 3d 898, 899 (CA11 1995) (*per curiam*); *O'Bryan* v. *McKaskle*, 729 F. 2d 991, 992-993 (CA5 1984) (*per curiam*); *Sullivan* v. *Dugger*, 721 F. 2d 719, 720 (CA11 1983) (section 1983 appropriate challenge to method of execution as prisoner does not contest "the fact or nature of his sentence or the state's right to execute him").

Under this reasoning, a competency-to-be-executed claim does not fall within habeas jurisdiction at all. This claim does not attack the legality of commitment, the common law function of habeas. See *Ex parte Watkins*, 3 Pet. 193, 202 (1830). Nor does it collaterally attack the underlying criminal judgment,

which is now the writ's chief function. See *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 840, 116 S. Ct. 2333, 2340 (1996). The prisoner is not contesting whether he is going to be executed, but whether he is currently competent to serve his sentence. Unlike a collateral attack on the validity of a death sentence, whether the prisoner is to be executed is not at issue; the only question is when he will serve his sentence.[8] Habeas addresses the legality of the sentence, not the timing of its execution.

3. Other decisions.

Other decisions from the circuit courts further demonstrate that habeas and § 1983 are not interchangeable. When confronted with a prisoner who wished to challenge his ineligibility for work release on habeas corpus, Judge Posner presented an elegant framework for determining whether an action belonged in habeas or § 1983.

> "The cases suggest the following generalization. If the prisoner is seeking what can fairly be described as a *quantum change in the level of custody*—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy. But if he is seeking a different program or location or environment, then he is challenging the conditions rather than the fact of his confinement and his remedy is under civil rights law, even if, as will usually be the case, the program or location or environment that he is challenging is more restrictive than the alternative that he

8. It is unrealistic to believe that many prisoners will be able to permanently bar execution on a competency-to-be-executed claim. Mental health is at best an inexact field. See *Medina* v. *California*, 505 U. S. 437, 451 (1992). Any diagnosis that a prisoner will *never* be competent to be executed must be viewed with great caution.

> seeks." *Graham* v. *Broglin*, 922 F. 2d 379, 381 (CA7 1991) (emphasis added).

As Judge Posner also noted, "[h]abeas corpus is not a compensatory remedy. The object is not to make whole someone who has suffered a loss; it is to determine whether a person is being confined in violation of basic norms of legality." *Allen* v. *Duckworth*, 6 F. 3d 458, 460 (CA7 1993). Excessive delay in resolving the prisoner's appeal of his conviction was not cognizable on habeas corpus because "[t]he petitioner was duly convicted, and the conviction upheld, if belatedly, in an appellate decision not claimed to be infected by any error that would justify his release on habeas corpus." *Ibid.* Habeas and § 1983 are separate entities. If one is unavailable, the other cannot act as its substitute. Therefore, "[h]abeas corpus does not provide a substitute for a damages suit even if such a suit would not be possible in the circumstances . . . ." *Id.*, at 461.

In *Moore* v. *Pemberton*, 110 F. 3d 22, 23 (CA7 1997) (*per curiam*), the Seventh Circuit admonished the District Court for transforming a "frivolous" and "malicious" § 1983 suit into a meritless habeas action.[9] *Ibid.* The District Court dismissed the *pro se* § 1983 action without ruling on the merits, but gave the prisoner " 'a reasonable period to channel his claims into a *habeas* action,' " claiming violations of *Wolff* v. *McDonnell*, 418 U. S. 539 (1974) or *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445 (1985). *Moore*, 110 F. 3d, at 23 (emphasis in original). After the prisoner complied with the District Court's invitation, the court dismissed the amended petition on its merits. *Ibid.* As the Seventh Circuit properly noted,

9. The prisoner claimed that he was punished for disciplinary violations although he was not a prisoner on the date indicated on the disciplinary ticket. 110 F. 3d, at 23. His penalty was a verbal reprimand and loss of commissary privileges for two weeks. *Ibid.* His § 1983 action asserted a due process violation, and asked for $351,000 in compensatory and $3.2 million in punitive damages. See *ibid.* The Court of Appeals found the amount of damages "malicious" and the action "frivolous," since Moore "did not lose any liberty or property . . . ." *Ibid.*

"As a petition for a writ of habeas corpus, Moore's claim suffers from a deeper defect, which should have prevented the judge from resolving the claim. Moore does not seek release from custody and therefore cannot proceed under 28 U. S. C. § 2254. It is not enough to be 'in custody'; unless one is attacking the legality, duration, or (rarely) severity of that custody, a petition under § 2254 is improper." *Ibid.*

Transforming a § 1983 action into a habeas petition was more than a matter of form, it "converted a weak civil suit into an *untenable* demand for collateral review." *Ibid.* (emphasis added). There are many real differences between the two actions, see *id.*, at 23-24, making it impossible to treat them interchangeably.

4. Most practical forum.

The procedural differences between habeas and § 1983 also make § 1983 the more practical forum for hearing competency-to-be-executed claims. This is demonstrated by one of the Court of Appeals' primary justifications for its holding. The Ninth Circuit found that it is effectively impossible for a habeas court to hear a competency claim if the rule against successive petitions is in effect. See *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 633-634 (CA9 1997). Instead of justifying a tortured construction of the statute, see *ibid.*, this procedural fact demonstrates § 1983's superiority as a forum for adjudicating competency claims.

The Ninth Circuit saw this problem arising from the exhaustion requirement, see 28 U. S. C. § 2254(b)(1); *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982), and the special status of the competency-to-be-executed claim. In order for a competency claim to be exhausted, the state must issue a warrant of execution so that the prisoner may contest his competency in state court. See 118 F. 3d, at 633. If the prisoner files his first federal habeas petition after exhausting the competency claim, the automatic stay of execution issued upon filing the petition renders the "once-ripe claim premature" leading to its dismissal.

Id., at 634. If the competency claim is filed after the first habeas petition, it will be barred as successive. See *ibid.*

Section 1983 avoids these problems. It has no exhaustion requirement. See *Heck* v. *Humphrey*, 512 U. S. 477, 489 (1994). Since jurisdiction for a § 1983 action does not depend upon the timing of a habeas petition, see *Preiser* v. *Rodriguez*, 411 U. S. 475, 499, n. 14 (1973) (prisoner may simultaneously file a § 1983 action and a habeas petition), litigation will proceed more efficiently, as the prisoner will not have to finish attacking his conviction and sentence before contesting his competency.

Convenience cannot substitute for jurisdiction, but it can guide litigants to the proper forum. Section 1983's relative efficiency for litigating competency claims reinforces the idea that Congress intended such actions to be brought under § 1983 instead of habeas corpus.

C. Narrow Remedy.

1. Ford v. Wainwright.

Dismissing the prisoner's habeas petition for lack of subject-matter jurisdiction does not leave him without the means to enforce his rights. Absent an adequate state remedy, a prisoner can contest his competency to be executed in a § 1983 action under the standards established in *Ford* v. *Wainwright*, 477 U. S. 399 (1986). This action is both limited and narrow. It is not governed by the more expansive language found in the portion of Justice Marshall's opinion that has only plurality support, but by the narrow grounds found in the concurrences.

Ford involved an exceptionally strong case for delaying the prisoner's execution. While on death row, Ford developed an increasingly delusional obsession about the Ku Klux Klan. *Id.*, at 402. He eventually believed that the Klan and others were involved in a complex conspiracy to drive him to commit suicide. *Ibid.* He believed that the concrete enclosures used for prison beds contained the bodies of people killed by this

conspiracy. He thought that they were holding hostage in the prison 135 of his family and friends along with "senators, Senator Kennedy, and many other leaders." *Ibid.* Ford eventually assumed authority to end "the 'crisis,' " claiming to have fired a number of prison officials. "He began to refer to himself as Pope John Paul III, and reported having appointed nine new justices to the Florida Supreme Court." *Ibid.* A psychiatrist who examined Ford earlier continued seeing him at the request of Ford's counsel. *Ibid.* The psychiatrist "concluded . . . that Ford suffered from 'a severe, uncontrollable mental disease which closely resembles "Paranoid Schizophrenia With Suicide Potential" ' . . . ." *Id.*, at 402-403. Ford eventually stated that " 'I can't be executed because of the landmark case I won. Ford v. State will prevent executions all over.' " *Id.*, at 403.

Ford's counsel invoked the Florida procedures for determining a condemned inmate's competency. *Ibid.* The Governor appointed a panel of three psychiatrists to determine whether Ford had the capacity to understand the nature of his penalty and why it was being imposed on him. *Ibid.* The three psychiatrists interviewed Ford at a single, 30-minute meeting. *Id.*, at 404. The three came to different diagnoses, but all found Ford sane under state law. *Ibid.* With the competency procedure ended, the Governor signed Ford's death warrant. *Ibid.*

The lead opinion's analysis of the case began in Part II, which was joined by a majority of the Court. It established the foundation for the *Ford* rule: that the Eighth Amendment can regulate the adequacy of state procedures for determining an inmate's competency to be executed. See *id.*, at 405. The actual standard for determining competency was not addressed.

The majority then found that the Eighth Amendment does bar the execution of the insane. *Id.*, at 409-410. This issue's freshness before the Court is explained by its unremarkability. Executing the insane has been universally proscribed since the formation of the common law. See *id.*, at 406-408; 4 W. Blackstone, Commentaries 24-25 (1st ed. 1769). The proscription carried over to this country, see *Ford*, *supra*, 477 U. S., at

408, and was accepted by every state that had capital punishment when *Ford* was decided. See *id.*, at 408-409, n. 2.

Parts III-V of Justice Marshall's opinion were joined by only a plurality of the Court. The opinion examined the inadequacy of the Florida procedures in detail. See *id.*, at 413-417. Although it did not recommend any specific state procedures, the plurality opinion contained expansive language requiring something close to a full-scale sanity trial. See *id.*, at 413-416, 418 (plurality); *cf. id.*, at 425 (Powell, J., concurring in part and concurring in the judgment) ("I would not require the kind of full-scale 'sanity trial' that JUSTICE MARSHALL appears to find necessary").

On an issue without a majority, the controlling opinion is the one concurring in the result on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Justice O'Connor's opinion explicitly states that inadequacy of the state's remedies was an essential component of Ford's case. See *Ford*, 477 U. S., at 427 (concurring in the result in part and dissenting in part). Justice Powell's opinion implies the same. That opinion only sought to ensure that "basic fairness is observed . . . ." *Ibid.* (opinion concurring in part and concurring in the judgment). Therefore, because Ford had "raised a viable claim under the Eighth Amendment, *and* because the claim was not adjudicated fairly within the meaning of due process or of [28 U. S. C.] § 2254(d)," Ford could make his claim before a federal court. *Ibid.* (emphasis added). If the state procedures had been sufficient, then *Ford* would have reached a different result.

2. The remedy.

Ford v. *Wainwright* is a case about procedure. Once a state provides the minimum necessary procedural guarantees,[10] any

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10. Under *Marks*, *supra*, 430 U. S., at 193, *Ford* does not mandate the "mini trial" advocated by the plurality, but no more than "an impartial officer or board that can receive evidence and argument from the prisoner's counsel" including

finding that the prisoner is competent to be executed cannot be attacked in federal court.

In addition to the narrowness of the *Ford* rule, substantial procedural barriers limit a prisoner's ability to use the federal courts to bypass the state's competency process. Although § 1983 suits are not subject to an exhaustion requirement, *Heck* v. *Humphrey*, 512 U. S. 477, 489 (1994), they are subject to the abstention doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971).

Younger applies Congress' long-standing policy "to permit state courts to try state cases free from interference from federal courts." *Id.*, at 43. It is therefore "perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.*, at 45. The *Younger* rule is not limited to injunctions, but includes any proceeding that has the effect of precluding resolution of the issue by the state court in which it is pending. See *Samuels* v. *Mackell*, 401 U. S. 66, 72 (1971) (declaratory relief).

Pending proceedings include execution of judgments. *Hill* v. *Martin*, 296 U. S. 393, 403 (1935) (under Anti-Injunction Act). Furthermore, the Full Faith and Credit Act applies to § 1983 actions, giving state court judgments the same preclusive effect that they would have in a subsequent state court action. *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980); 28 U. S. C. § 1738.

By protecting state court judgments in federal court "res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U. S., at 95-96. *Ford* similarly respects the integrity of state competency determinations. In spite of strong evidence of Ford's incompetency, the *Ford* opinions did not attempt to set the standard of competency to be executed, concentrating solely on the adequacy of the state competency determination procedure. See *ante*, at 26-27. Furthermore, the controlling opinions understood the need to preserve state systems from federal intrusion. See *Ford* v. *Wainwright*, 477 U. S. 399, 427 (1986) (Powell, J., concurring in part and concurring in the judgment); *id.*, at 429 (O'Connor, J., concurring in the result in part and dissenting in part). The one exception to *Ford*'s deference, inadequate state procedures, parallels the main exception to collateral estoppel, the lack of a "full and fair opportunity" to litigate the issue. See *Allen* v. *McCurry*, *supra*, 449 U. S., at 95; *Montana* v. *United States*, 440 U. S. 147, 153 (1979).

There are strong policy reasons to leave the competency-to-be-executed issue to the relevant state procedures. Determining an individual's competency is inevitably inexact. See *Ford*, *supra*, 477 U. S., at 412 (plurality); *Medina* v. *California*, 505 U. S. 437, 451 (1992) (subjectivity of psychiatry); *Addington* v. *Texas*, 441 U. S. 418, 430 (1979) (same). When combined with the prisoner's overwhelming interest in frustrating the execution of his sentence, "the potential for false claims and deliberate delay in this context is obviously enormous." *Ford*, 477 U. S., at 429 (O'Connor, J., concurring in the result in part and dissenting in part). Multiple forums for litigation or extensive procedural requirements for the competency determination would make these problems much worse.

> "This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary." *Ibid.* (emphasis in original).

A proper reading of *Ford* minimizes these risks. In any state with an adequate procedure for determining competency,

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expert testimony contradicting the state's psychiatric evidence. See *Ford*, 477 U. S., at 427 (opinion of Powell, J.); *id.*, at 430 (opinion of O'Connor, J.) (Florida procedure's only flaw was not allowing petitioner the opportunity to present his case).

the federal courts would not interfere with state competency findings. They would either abstain under *Younger* or deny relief on the ground that one of the elements of the claim, inadequacy of state process, is missing. Once the state court determines, *with* due process, that the inmate is indeed competent, that finding would be res judicata, and again the federal court would not interfere. Federal intervention remains available as a last resort where there is no adequate state process. See, *e.g.*, *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973).

When it enacted the Antiterrorism and Effective Death Penalty Act of 1997, Congress decided that the vast majority of state convicts should only get one run through the federal system. An interpretation of that act that allows competency claims to be brought as a matter of routine would frustrate that intent. Allowing prisoners to bring § 1983 actions *only* when state competency procedures are inadequate would safeguard the federal right while still carrying out the intent of Congress.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

November, 1997

Respectfully submitted,

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(8)

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

No. 97-300

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY STEWART, Director, Arizona Department of Corrections, et al., *Petitioners*,

v.

RAMON MARTINEZ-VILLAREAL, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, DELAWARE, IDAHO, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the limitations on the habeas corpus authority of the federal courts to entertain second or successive petitions, as set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), bar the litigation of competency to be executed claims.

2. Whether the limitations on the habeas corpus authority of the federal courts to entertain second or successive petitions, as set forth in the Act, violate the Suspension of the Writ Clause.

3. Whether, and by what means, can this Court review these issues.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
No. 97-300

TERRY STEWART, Director, Arizona Department of Corrections, et al., *Petitioners*,

v.

RAMON MARTINEZ-VILLAREAL, *Respondent*.

INTEREST OF AMICI CURIAE

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") which contains several statutory limitations on the habeas corpus jurisdiction of the federal courts over state court judgments, including limitations on entertaining second or successive habeas corpus petitions. The application of those limitations divests the federal courts of the power to consider present competency to be executed claims in habeas corpus proceedings. The presentation of present competency to be executed claims in turn would be left to the process afforded by individual States. Amici are responsible for defending presumptively valid state judgments, including death penalty judgments, against federal habeas corpus challenges. Amici's interests would therefore be served by a resolution of the questions presented.[1]

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1. This brief is submitted in support of petitioners by amici

SUMMARY OF ARGUMENT

The question of whether the Act's stringent limitations on second or successive habeas corpus petitions survive constitutional review --- though they deprive the federal courts of the power to entertain present competency to be executed claims --- is inextricably intertwined with the nature of those statutory limitations. These limitations operate on the power and authority of the federal courts, because, absent certain stringent exceptions, the limitations divest federal courts from declaring what the law is as to any claim presented in a second or successive petition, and mandate dismissal. Such a drastic limit on the power and authority of the federal courts to entertain second or successive habeas corpus actions render the provisions jurisdictional in nature.

The power to confer, limit, or oust the subject matter jurisdiction of the federal courts, including their habeas corpus jurisdiction, rests with Congress under Article III of the United States Constitution. Since the time of the Framers, Congress and the courts alike have operated with the understanding that Congress possesses wide discretion to confer, limit, or oust jurisdiction as policy considerations of separation of powers and federalism may require. This understanding of Congress' power has never wavered, be it in the context of a habeas corpus statute or otherwise. Nor has the Suspension Clause ever been viewed as undermining that power.

It is especially proper for this Court to accord its traditionally wide deference to Congress' cabining of

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through their respective Attorneys General in accordance with Rules 37.2 and 37.5 of the Rules of the United States. Amici will brief neither the first nor third question presented as they understand that those questions will be thoroughly addressed in other briefs. *See* Rule 37.1 of the Rules of the United States.

federal court jurisdiction where some alternative state process exists. If any recent congressional enactment demonstrates Congress' solicitude for maintaining a vibrant political structure of dual federal-state sovereignties, it is this one.

ARGUMENT

Congress Properly Exercised Its Article III Power To Divest Federal Courts Of Jurisdiction Over Present Competency To Be Executed Claims By Enacting New Limitations On Second Or Successive Habeas Corpus Petitions

By enacting the Act, Congress has substantially changed the federal habeas corpus landscape in which state criminal convictions are collaterally reviewed by federal courts. Congress recognized that state courts could and should be entrusted with greater responsibility, latitude, and deference in their enforcement of federal constitutional rights. Congress therefore chose to enhance the ultimate integrity and finality of state laws and judgments by limiting the habeas corpus authority of the federal courts to review state proceedings in sections 104, 105, and 106 of Title I of the Act. *See* Pub. L. 104-132, 110 Stats. 1217. At issue here are the limitations on second or successive habeas corpus petitions in section 106(b) of Title I of the Act, codified at 28 U.S.C. § 2244(b).

Because section 2244(b) of the Act severely curtails the power of the federal courts to entertain second or successive habeas corpus petitions, Congress has effectively imposed a broad barrier to the exercise of federal habeas corpus jurisdiction as to such petitions. Federal subject matter jurisdiction, including habeas corpus jurisdiction, is not "self-executing" under the Constitution. Rather, it is conferred and regulated by Congress. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986). Article III of the United States Constitution grants Congress the power to

shape federal court jurisdiction as policy considerations of federalism and separation of powers may dictate.

Consequently, a determination as to whether section 2244(b) operates as a jurisdictional limitation on the habeas corpus power of the federal courts is a necessary prerequisite to consideration of the substantive issues of section 2244(b)'s constitutionality. *See Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. ___, 117 S.Ct. 1776, 1779 (1997). If section 2244(b) is viewed as a jurisdictional "governor" on the habeas corpus power of the federal courts, then the constitutionality of its divesting habeas corpus jurisdiction from those courts, including over competency to be executed claims, becomes an almost foregone conclusion notwithstanding the Suspension Clause.

A. The Act's Limitations On The Power Of The Federal Courts To Entertain Second Or Successive Petitions Cabin The Federal Courts' Exercise Of Their Subject Matter Jurisdiction Over Habeas Corpus Cases

Article III provides in relevant part that the "appellate jurisdiction" of this Court, and of those "inferior" federal courts established by Congress, is subject to definition by Congress, which is empowered to make "such Exceptions and . . . such Regulations," as Congress deems fit. U.S. Const. Art. III, §§ 1, 2, cl. 2. Construing Article III, this Court has found that "[t]he Congressional power to ordain and establish inferior courts includes the power of 'investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (internal citations omitted). The threshold question, then, is whether section

2244(b) operates on the Article III subject matter jurisdiction of the federal courts by its new limits on the power and the authority of the federal courts to entertain habeas corpus challenges to state court judgments.

Congressional statutes granting or withdrawing jurisdiction generally "'speak to the power of the court rather than the rights or obligations of the parties.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal citation omitted); *see Bruner v. United States*, 343 U.S. 112, 116-7 (1952). As members of this Court explained just last term in construing 28 U.S.C. § 2254(d) of the Act,

> It shares the most salient characteristics of jurisdictional statutes: its commands are addressed to courts rather than individuals. Section 2254(d) does not address criminal defendants, or even state prosecutors; it prescribes or proscribes no private conduct. Instead, it is addressed directly to federal courts, providing, '[a]n application for a writ of habeas corpus *shall not be granted. . . unless . . .*' . . . .

Lindh v. Murphy, ___ U.S. ___, 117 S.Ct. 2059, 2071-72 (1997) (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, J.J.) (emphasis in original).

Section 2244(b), too, shares "the most salient characteristics" common among jurisdictional statutes. Its commands are addressed directly to the power of the federal courts, rather than the rights and obligations of the parties. *See Landgraf*, 511 U.S. at 274. It provides, for example, that "[a] claim presented in a second or successive habeas corpus action that was presented in a prior application *shall be dismissed*." 28 U.S.C. § 2244(b)(1) (emphasis added).

This strong signal of commonality with jurisdictional statutes is not muted by the failure of section 2244(b) to employ the talismanical word "jurisdiction." The mere presence or absence of the word jurisdiction in

a federal statute does not operate as the condition *sine qua non* for ascertaining whether that statute operates on the subject matter jurisdiction of the federal courts. *See, e.g., Farm Credit Serv.*, 117 S.Ct. at 1778 (explaining that the Tax Injunction Act is "first and foremost a vehicle to drastically limit federal district court jurisdiction. . . .");[2] *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981) (pre-Act section 2254(d) was intended by Congress to limit federal habeas corpus jurisdiction).[3]

Nor is the signal sent by Section 2244(b) one which on closer examination turns out to be a reflection of mere artifice. Section 2244(b) in fact constitutes a limitation on the Article III habeas corpus jurisdiction of the federal courts. "Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953); *accord, e.g., Lonchar v. Thomas*, 517 U.S. ___, 116 S.Ct. 1293, 1298 (1996). This principle has been a long standing one. As Chief Justice Marshall explained, "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Ex Parte Bollman*, 8 U.S. (4 Cranch) 74, 93-4 (1807). This is a reflection of the fundamental principle that federal

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2. The Tax Injunction Act provides that "[t]he district court shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Farm Credit. Serv.*, 117 S.Ct. at 1778.

3. Pre-Act section 2254(d) provided in relevant part: "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue made by a State court of competent jurisdiction . . . shall be presumed to be correct, ..." 28 U.S.C. § 2254(d) (West. 1996) (prior to its being amended and restated as 28 U.S.C. § 2254(e) in the Act).

subject matter jurisdiction is not "self-executing" -- it is granted and regulated by Congress. *See, e.g., Merrell Dow*, 478 U.S. at 807.

Congress first extended the federal courts' habeas corpus jurisdiction to encompass claims made by state prisoners in 1867. *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2338 (1996).[4] The 1867 Act is currently codified at 28 U.S.C. §§ 2241(c)(3) and 2254(a).[5] *See, e.g., Felker*, 116 S.Ct. at 2338 n.2 ("This language from the 1867 Act is the direct ancestor of § 2241(c)(3) . . ."); *id.*, at 2339 n.4 (section 2254 is "declaratory of existing law"); *Sumner*, 449 U.S. at 547-8 n.2 ("The present codification of the federal habeas statute [section 2254] is the successor to 'the first congressional grant of jurisdiction to the federal courts,' *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise

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4. The 1867 Act, entitled an Act to Amend the Judiciary Act of 1789, states:

> That the several courts of the United States, and the several justices and judges of said courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States.

Act of Feb. 5, 1867; ch. 28, 14 Stat. 385: *see Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 86 (1869).

5. Section 2241(c)(3) provides in material part that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . (3) he is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3). Section 2254(a) provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

of that jurisdiction."). Sections 2241 and 2254, working together, provide the bedrock authority for federal courts to exercise their jurisdiction over the claims of state prisoners. *See, e.g., Felker*, 116 S.Ct. at 2337, 2339; *Greenawalt v. Stewart*, 105 F.3d 1287, 1287 (9th Cir. 1997) (*citing Felker*, 116 S.Ct. at 2339-40); *see also Sumner*, 449 U.S. at 547-8 n.2.

Accordingly, Congress need only modify section 2254 in order to expand or contract the habeas corpus jurisdiction of the federal courts. Both Congress and this Court have operated on this understanding. *See, e.g., Sumner*, 449 U.S. at 547-8 n.2; *Wainwright v. Sykes*, 433 U.S. 72, 101 n.2 (1977) (Brennan, J., dissenting, joined by Marshall, J.) ("Congress, as the primary expositor of federal jurisdiction, remains free to undo the potential restrictiveness of today's decision by expressly defining the standard of intervention under 28 U.S.C. § 2254."); Senate Report No. 1559, Amendment No. 47 (*quoted* in full in "Historical and Statutory Notes" following section 2254 in 1997 Supp. to the U.S.C.A.). The form that Congress chose in the past, with the ultimate approval of this Court, to modify the habeas corpus jurisdiction of the federal courts under section 2254(a) was to enact a separate subsection (*d*) curtailing the habeas corpus authority of the federal courts to relitigate state court adjudications of fact. *See Sumner*, 449 U.S. at 547-8 n.2.[6]

It was against this backdrop that Congress acted to modify the habeas corpus jurisdiction of the federal courts to entertain second or successive petitions under section 2254(a) by enacting section 2244(b). That

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6. It is not an unusual practice for Congress to choose to modify jurisdiction-conferring statutes by enacting separate statutory provisions, codified elsewhere, which effect a limited withdrawal of that jurisdiction. *See, e.g., Hughes Aircraft Co. v. U.S. ex. rel. Schumer*, ___ U.S. ___, 117 S.Ct. 1871, 1874-75, 1878 (1997); *Farm Credit Serv.*, 117 S.Ct. at 1778.

Congress drastically modified the power and authority of the federal courts to entertain second or successive petitions by enacting section 2244(b) can readily be discerned from the statutory language.

Under section 2244(b)(1), federal courts can no longer entertain any claim presented in a second or successive application under section 2254 if it was presented in a prior application. Rather, the federal courts must dismiss that claim. *See* 28 U.S.C. § 2244(b)(1). Under section 2244(b)(2), federal courts can no longer entertain any claim presented in a second or successive application under section 2254, even if it was not otherwise presented in a prior application, unless certain stringent prerequisites are satisfied. *See* 28 U.S.C. § 2244(b)(2).[7] This language acts as a regulator of federal court jurisdiction because, absent specific stringent conditions, it prevents the courts from declaring the law under section 2254(a) and mandates dismissal. "Jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).[8]

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7. Under section 2244(b)(2)(A), a new claim presented for the first time in a second or successive application may be entertained if "the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . ." 28 U.S.C. § 2244(b)(2)(A). Or, under section 2244(b)(2)(B), a new claim presented for the first time in a second or successive application may be entertained if (i) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* (ii) "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i), (ii).

8. The fact that sections 2244(b)(2)(A) and (B) grant habeas corpus jurisdiction to the federal courts in stringently limited circumstances to entertain second or successive applications does not transmogrify section 2244(b) into an operationally nonjurisdictional statute. Take the Tax Injunction Act, which divests the district courts of the jurisdiction to enjoin the collection of state taxes. *See Farm Credit Serv.*, 117 S.Ct. at 1778. Although limited circumstances exist under the Tax Injunction Act in which a district court retains jurisdiction, it is not thereby transmogrified into an operationally nonjurisdictional statute. *See id.*, at 1778-80.

B. Congress Enjoys The Power Under Article III To Proscribe The Federal Courts' Exercise Of Their Subject Matter Jurisdiction Over Habeas Corpus Cases Even Where That Proscription Deprives The Federal Courts Of The Authority To Entertain Present Competency To Be Executed Claims

Once section 2244(b) is viewed in its proper context as a statute regulating the federal courts' habeas corpus jurisdiction as set forth in sections 2241(c)(3) and 2254(a), then the path for ascertaining its constitutionality becomes smooth. The power to proscribe the boundaries of federal habeas corpus jurisdiction *a fortiori* encompasses the power to divest the federal courts of the power to entertain habeas corpus claims, such as present competency to be executed, which fall outside of those boundaries. Congress chose to exercise the power expressly allocated to it under Article III to circumscribe the boundaries of federal habeas corpus jurisdiction. Congress' exercise of that Article III power is entirely constitutional notwithstanding whether the Suspension of the Writ Clause is construed in light of its modern scope, or -- more properly in amici's view -- in light of its scope in 1789. And, Congress' exercise of that power to divest the habeas corpus jurisdiction of the federal courts to entertain present competency to be executed claims

should receive especially wide deference where alternative state process -- coupled with this Court's certiorari power -- exists for the resolution of these claims.

Interpreting the Constitution must begin with its text. *See Nixon v. United States*, 506 U.S. 224, 232-3 (1993). Backtracking to the constitutional starting point here --- Article III --- the text itself countenances an expansive interpretation of Congress' power to grant, limit, or withdraw subject matter jurisdiction. First, section one of that article states not only that "inferior" (i.e. lower) federal courts need not exist at all, but it also vests express discretion in Congress in "ordain[ing] and establish[ing]" those courts. U.S. Const. Art. III, § 1. Moreover, section two of that article provides that --- aside from those relatively few cases in which this Court is granted "original" jurisdiction[9] --- this Court's jurisdiction is subject to definition by Congress which may make "Exceptions" and "Regulations" as it sees fit for this Court's exercise of that jurisdiction. U.S. Const. Art. III, § 2, cl. 2.

When the Framers examined what they had wrought, they took an expansive view of Congress' Article III powers. As Alexander Hamilton wrote,

> If some partial inconveniences should appear to be connected with the incorporation of [the particular powers of the federal judiciary] into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such

9. The "original" jurisdiction vested exclusively in this Court exists over cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party." U.S. Const. Art. III, § 2. Congress cannot add to nor subtract from the original jurisdiction of this Court. *See South Carolina v. Regan*, 465 U.S. 367, 396-98 (1984) (O'Connor, J., concurring, joined by Powell, Rehnquist, J.J.); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803).

> regulations as will be calculated to obviate or remove these inconveniences.

The Federalist No. 80 (Hamilton), at 408 (Bantam ed. 1982) (emphasis in original). Hamilton would revisit this theme in addressing whether this Court could revisit factual adjudications made by a jury:

> To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and fact, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

The Federalist, No. 81 (Hamilton), at 416 (Bantam ed. 1982) (footnote omitted) (emphasis in original).

Following on the heels of the Constitution's ratification, Chief Justice Marshall soon put pen to paper to convey his view that Article III granted expansive authority to Congress to set the groundwork for the federal courts' exercise of their jurisdiction.

> When the first legislature of the union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions in express terms. They have not declared that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

Durousseau v. United States, 9 U.S. (6 Cranch) 307, 314 (1810).

Since the early years of the Republic, this Court has continued to reiterate and endorse the view that federal court jurisdiction is not self-executing. Rather, it rises or falls via congressional enactment. *See, e.g., Merrell Dow*, 478 U.S. at 807; *Palmore v. United States*, 411 U.S. 389, 400-01 (1973); *Lockerty*, 319 U.S. at 245; *Klein v. Burke Const. Co.*, 260 U.S. 226, 233-34 (1922); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *see also Regan*, 465 U.S. at 396-98 (O'Connor, J., concurring, joined by Powell, Rehnquist, J.J.) (contrasting the "appellate jurisdiction" of the federal courts with the "original jurisdiction" of this Court in finding that only in the former circumstance does Congress have the power of determining what cases, if any, should be channelled to the federal courts).

And, Congress has repeatedly resorted to its Article III power to make limited grants of jurisdiction --- or even withdraw previously granted jurisdiction --- without the expression of any qualms on the part of the Court. *See Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 2370 (1997) (*quoting Myers v. United States*, 272 U.S. 52, 175 (1926)) ("contemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, fixes the construction to be given its provisions."). For example, while Congress set up the federal courts (albeit with limited jurisdiction) as early as the 1789 Judiciary Act, it did not grant the courts general federal-question jurisdiction until the Judiciary Act of 1875. *See Merrell Dow*, 478 U.S. at 807. This Court has long interpreted that statutory grant of federal question jurisdiction as conferring a more limited power on the federal courts than that assigned by the Constitution. *See id.*, at 807-08. The Tax Injunction Act, noted above, qualifies as one example where Congress actually *withdrew* the jurisdiction of the federal courts to interfere with the collection of state taxes. *See Farm Credit Serv.*, 117 S.Ct. at 1778. And, this Court unanimously reaffirmed last term

that the Tax Injunction Act was a "broad jurisdictional barrier" which had to be applied in spite of the wishes of the litigants. *See id.*, at 1779.

But, the case in this area which has played the greatest role in confirming this view of Article III is *Ex Parte McCardle*. In *Ex Parte McCardle*, this Court held that Congress could, by statute, withdraw this Court's appellate jurisdiction over habeas petitions filed under the Habeas Corpus Act. As Justice Chase wrote on behalf of the Court, "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction is given by express words. [¶]. . . . Without jurisdiction, the court cannot proceed at all in any cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) at 514.

By design of the Framers, Article III serves as a means for Congress to check the power of the judiciary where appropriate in order to help ensure balance between the legislative and judicial branches of the Federal Government. *See, e.g., Cary*, 44 U.S. (3 How.) at 245; The Federalist No. 80 (Hamilton), at 408 (Bantam ed. 1982); *see also Merrell Dow*, 478 U.S. at 807-10. At the same time, it provides an opportunity for Congress to safeguard the sovereign interests of the States to carry out their own local affairs and enforce their own local laws without undue federal interference. As this Court expounded just last term,

> It is incontestable that the Constitution provides for a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residual and inviolable sovereignty." This is reflected throughout the Constitution's text, including (to mention only a few examples) . . .; *the Judicial Power Clause, Art. III, § 2, . . .*."

Printz, 117 S.Ct. at 2376 (emphasis added; internal citations omitted). Where Congress therefore chooses to confine federal court intervention into state affairs via a jurisdiction-withdrawing provision, this Court can and has exhibited a special sensitivity towards interpreting that provision in such a way as to avoid defeating state sovereignty interests. *See Farm Credit Serv.*, 117 S.Ct. at 1780. In the end, Article III constitutes a key cornerstone for the principles of separation of powers and federalism which together undergird our Constitution.

Additionally, implicit in the text of the Constitution itself --- and explicit in subsequent statements of the Framers and of this Court --- is the proposition that state courts possess coordinate and coequal jurisdiction with the lower federal courts to adjudicate federal issues. *See, e.g.,* U.S. Const. Art. III, § 1 (Constitution established a Supreme Court, but made the establishment of lower federal courts optional with Congress); *id.* Art. V., cl. 2 (Constitution announced that "the Law of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."); The Federalist No. 82 (Hamilton), at 419 (Bantam ed. 1982) ("state courts would have a concurrent jurisdiction in all cases arising under the laws of the union"); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1988); *Sawyer v. Smith*, 497 U.S. 605, 617 (1989); *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1064 n.11 (1997).

In what is known as the "Madisonian Compromise," the drafters of the Constitution agreed that it should be left to the policy judgments of Congress to determine whether, and to what extent, cases should be channelled to the lower federal courts. *See* The Federalist, No. 81 (Hamilton), at 412-13 (Bantam ed. 1982); *Regan*, 465 U.S. at 369 (O'Connor, J., concurring, joined by Powell, Rehnquist, J.J.) (". . . because the Framers believed the state courts would be adequate for

resolving most disputes, they generally left to Congress the task of determining what cases, if any, should be channelled to the federal courts."); *Printz*, 117 S.Ct. at 2371; Gunther, *Congressional Power to Curtail Federal Jurisdiction; An Opinionated Guide to the Ongoing Debate*, 36 Stan L. Rev. 895, 912 (1984). It follows that Congress can in its judgment also choose when policy interests would best be served by enacting legislation designating the States as the preferred forum for litigating federal issues.

The Suspension of the Writ Clause provides that "[t]he privilege of the writ of habeas corpus shall not be suspended unless when in cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, cl.2. Amici agree with petitioner, the State of Arizona, that the Suspension Clause should be construed according to the scope of the writ as it existed in 1789. *See* Pet. for Cert., at 13-19. Congress, accordingly, has the power under Article III to withdraw the jurisdiction of the federal courts over any case which would not have been cognizable on federal habeas corpus review in 1789.

But, no matter whether the Suspension Clause is construed in light of its historical or its modern scope, it has never been viewed as any substantial impediment to Congress' exercise of its broad Article III power to regulate the subject matter jurisdiction of the federal courts. *See, e.g., Ex Parte Bollman*, 8 U.S. (4 Cranch) 74, 93-4 (1807) (Marshall, C.J.); *Ex Parte McCardle*, 74 U.S. (7 Wall.) at 514; *Felker*, 116 S.Ct. at 2340; *see also, e.g., Lonchar*, 116 S.Ct. at 1298.

What has been left unanswered in the more than 200 year history of Article III is the residual question of whether Congress could completely divest this Court of all subject matter jurisdiction to review state proceedings, such that state proceedings would be entirely unreviewable even on writ of certiorari. *See* Gunther, *supra*, at 909, 914-16 & nn. 62, 72, 113. Wherever the answer may

ultimately lie to that question, the question itself does not even arise in this context where the only constraints which may exist on this Court's discretionary certiorari review of state proceedings are self-imposed for reasons of policy. *See Kyles v. Whitley*, 514 U.S. 419, 422, 440 & n.1 (1995) (Souter, J., writing for a majority of the Court); *id.*, at 454-55 (Stevens, J., concurring, joined by Ginsburg, Breyer, J.J.); *id.*, at 456-60 (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy, Thomas, J.J.).[10]

In the present context, section 2244(b) therefore embodies nothing more than a reasonable exercise of Congress' Article III power to regulate the subject matter jurisdiction of the federal courts to entertain habeas corpus claims such as competency to be executed. Where some state process exists for the resolution of such claims which this Court may review as appropriate via its certiorari power, it remains especially appropriate for this Court to apply its long standing deference to Congress' exercise of its Article III power. *See In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997). Here, most of the capital States have designated a specific process for review of present competency to be executed claims. *See* Appendix.[11]

The effect of section 2244(b) amounts to nothing more in the end than to restrike the balance true between

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10. Presumably, the question of whether certiorari review should be granted on constitutional claims which only concern a dispute of fact continues to remain an appropriately deferential one to the state factfinder. *See Culombe v. Connecticut*, 367 U.S. 568, 603-05 (1961) (opinion of Frankfurter, J.) (state factfinding is conclusive and binding on this Court on direct appeal unless the findings wholly lack support in the evidence); *see also Kyles*, 514 U.S. at 457 (Scalia, J., dissenting); Fed. R. Civ. P. 52(a).

11. In *Ford v. Wainwright*, 477 U.S. 399, this Court listed those capital States which recognize a right of an incompetent defendant not to be executed. *See id.*, at 408 n.2.

state and federal forums in the enforcement of federal rights. And, the exercise of that power to restrike the balance between state and federal fora has never been deemed by this Court to be circumscribed by the Suspension of the Writ Clause at any point in the writ's more than 200 year old history. Nor should it be now.

CONCLUSION

Accordingly, amici respectfully request that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit, and remand this case to that court for further disposition as appropriate.

Dated: November 25, 1997.

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APPENDIX

ALABAMA, Ala. Code § 15-16-23 (1996) authorizes suspending the execution of a capital inmate if "it is made to appear to the satisfaction of the trial court that the convict is then insane." If it subsequently is made to appear to the court that such inmate is restored to sanity, the trial court shall order the execution of the judgment and sentence originally awarded in said court. The court may impanel a jury to try the question of insanity or examine "such witnesses as [the court] may deem proper for guidance."

ARIZONA, Ariz. Rev. Stat. Ann. § 13-4022 (1997) authorizes the director of the state department of corrections, the prisoner's attorney, or an attorney for the state, upon "good reason to believe that the prisoner may be mentally incompetent to be executed," to file a motion in the superior court in the county in which the prisoner is located "setting forth the facts relating to the prisoner's conviction and sentence and the facts giving rise to the belief that the prisoner may be mentally incompetent to be executed and requesting the court to order that the prisoner be examined for mental competency to be executed." If a stay of execution is desired, an application for a stay "shall be submitted to the supreme court." On receipt of a motion for examination of competency, the superior court "shall determine if the motion is timely and presents reasonable grounds for the requested examination." If the motion is timely and presents reasonable grounds for the requested examination, the court "shall appoint experts pursuant to the Arizona rules of criminal procedure."

Ariz. Rev. Stat. Ann. § 13-4022 further provides that after the examinations are completed, the court "shall conduct a hearing to determine the

prisoner's competency to be executed." At the hearing, all the parties may present evidence, cross-examine witnesses and present argument or by stipulation may submit the matter for the court's determination on the basis of the experts' reports. There is a presumption that prisoners who are sentenced to death are competent to be executed. A prisoner may be found incompetent to be executed only on "clear and convincing evidence" of incompetency. The superior court "shall specifically state its findings on the record." If the court finds that the prisoner is incompetent, the court "shall suspend the execution and shall immediately transmit a copy of its order to the supreme court." The supreme court may review the superior court's findings. If no review is sought or the supreme court upholds the finding of incompetency to be executed, the director of the state department of corrections "shall deliver the prisoner to the state hospital." The prisoner "shall remain confined at the state hospital until the prisoner becomes competent to be executed."

Ariz. Rev. Stat. Ann. § 13-4023 (1997) orders that after a prisoner recovers competency to be executed, the chief medical officer of the state hospital "shall return the prisoner to the state department of corrections and shall certify to the supreme court that the prisoner is competent."

ARKANSAS, Ark. Code Ann. § 16-90-506 (1987-1995) provides that, "When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment," the director shall notify the Deputy Director of the Division of Mental Health Services of the Department of Human Services who shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days

of receipt of notification. The Director of the Department of Correction shall also notify the Governor and the prisoner's attorney of record of this action. If the individual is found incompetent due to mental illness, the Governor shall order that appropriate mental health treatment be provided. The director may order a reevaluation of the competency of the individual as circumstances may warrant.

CALIFORNIA, Cal. Pen. Code § 3700.5 (West 1997) orders an examination by three alienists to investigate the sanity of a capital inmate whenever a date has been set upon which a judgment of death shall be executed upon that inmate. Cal. Pen. Code § 3701 (West 1997) orders the warden to notify the district attorney of the county in which the prisoner is situated if, after the inmate's delivery to the warden for execution, "there is good reason to believe that a defendant, under judgment of death, has become insane." The district attorney must "immediately file" a petition in the superior court stating that the defendant is believed to be insane and requesting an inquiry into the defendant's sanity. The superior court "must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry."

Cal. Pen. Code § 3703 (West 1997) provides that when the defendant has been found to be insane, the court must order that the defendant be taken to a medical facility of the Department of Corrections, "and there kept in safe confinement until his reason is restored." Cal. Pen. Code § 3704 (West 1997) further orders the warden to suspend the execution upon a finding that the defendant is insane.

COLORADO, Colo. Rev. Stat. Ann. § 16-8-110 (West 1997) mandates that no person shall be "tried, sentenced, or executed if such person is incompetent to

proceed at that stage of the proceedings against him or her." The question of the defendant's competency to proceed shall be raised either (1) If the trial judge has "reason to believe that the defendant is incompetent to proceed;" (2) By motion of either the prosecution or defense made in advance of the commencement of the particular proceeding; or (3) By the affidavit of any chief officer of an institution having custody of a defendant awaiting execution.

Colo. Rev. Stat. Ann. § 16-8-111 (West 1997) orders the district court of the county in which the defendant is confined to make a preliminary finding whether the defendant is competent to be executed "[w]henever the question of a defendant's incompetency to proceed is raised." The court may order a competency examination "or such other investigation as it deems advisable." Upon the written request of either the prosecuting attorney or defense counsel, the court "shall hold a hearing and may commit the defendant for a competency examination prior to the hearing if adequate psychiatric information is not already available." The burden of submitting evidence and the burden of proof by a preponderance of the evidence are upon the party asserting the incompetency of the defendant. At the conclusion of the hearing, the court shall make a final determination.

CONNECTICUT, Conn. Gen. Stat. Ann. § 54-101 (West 1997) authorizes the warden to make an application to the superior court whenever any person awaiting execution of a sentence of death "appears to be insane." After a hearing on the application, the court may appoint three physicians to examine the mental condition of the capital inmate. Upon certificate of a majority of the physicians stating that such inmate is insane, the court must order the sentence of execution

to be stayed and such inmate transferred to a state hospital until he or she recovers sanity.

DELAWARE does not have a statutory provision explicitly requiring the suspension of the execution of a capital inmate who meets the legal test for incompetence. However, Delaware Supreme Court Rule 35(e), authorizes a capital inmate, either pro se or through counsel, to make an application to the superior court for a stay of execution of sentence "in any proceeding, including postconviction proceedings." The superior court's decision "shall be reviewable" by the Delaware Supreme Court. This procedure has been applied in a case where a capital inmate requested a stay of execution to determine his competency to be executed. *Red Dog v. State*, 620 A.2d 848, 849 (1993).

Furthermore, Del. Code Ann. tit. 11, § 406 (1975-1996) concerning the transfer of convicted persons becoming mentally disabled from prison to the Delaware Psychiatric Center, has traditionally been construed to apply to inmates awaiting execution of a death sentence. *See Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986). Del. Code Ann. tit. 11, § 406 authorizes the superior court to appoint two physicians to inquire of the mental condition of the prisoner and make a report of their finding to the court "[w]henever in any case it appears to the court, upon information received from the Department of Health and Social Services, that a prisoner confined with the Department has become mentally ill after conviction and sentence." Should the report of the physicians be that the prisoner is mentally ill, "the prisoner shall at once be ordered by the Court transferred from the prison facility where the prisoner is confined to the Delaware Psychiatric Center."

FLORIDA, Fla. Stat. Ann. § 922.07 (West 1997) provides that when the governor "is informed that a person under sentence of death may be insane," the governor "shall stay execution of the sentence with authority to appoint a commission of three psychiatrists to examine the convicted person." Counsel for the convicted person and the state attorney may be present at the examination, and if the convicted person does not have counsel, counsel shall be appointed to represent him or her. If the governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him or her, the governor "shall have the convicted person committed to a Department of Corrections mental health treatment facility." The capital inmate shall be kept at the mental health treatment facility until he or she has been restored to sanity.

Fla. Rule Crim. Pro. Rule 3.811 (West 1997) provides that a person who "lacks the mental capacity to understand the fact of the impending execution and the reason for it" shall not be executed. Rule 3.811 authorizes the filing of a motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, after determination of the Governor of Florida that the prisoner is sane to be executed. The motion must contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner is insane to be executed. Counsel for the prisoner and the state "may submit such other evidentiary material and written submissions including reports of experts on behalf of the prisoner as shall be relevant to determination of the issue." Rule 3.811 authorizes the circuit judge to grant a stay of execution if he or she has "reasonable grounds to believe that the prisoner is insane to be executed," and may order further proceedings pursuant to Fla. Rule Crim. Pro. 3.812.

Fla. Rule Crim. Pro. 3.812 (West 1997) authorizes a hearing de novo on the inmate's competency for execution and allows the court to (1) require the presence of the prisoner at the hearing; (2) appoint up to three mental health experts to examine the prisoner and report their findings and conclusions to the court; and (3) "[e]nter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." At the hearing, the court may admit "such evidence as the court deems relevant to the issues," including but not limited to the reports of expert witnesses, and the court "shall not be strictly bound by the rules of evidence." Rule 3.812(e) provides that, if the court finds by clear and convincing evidence that the prisoner is incompetent to be executed, the court "shall enter its order continuing the stay of the death warrant."

GEORGIA, Ga. Code Ann. § 17-10-60 (1982-1997) provides that a person is "mentally incompetent to be executed" if that person "is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-61 (1982-1997) provides that an incompetent person shall not be executed. Ga. Code Ann. § 17-10-62 (1982-1997) states that this article is the "[e]xclusive procedure for challenging mental competency to be executed. . . ."

Ga. Code Ann. §§ 17-10-63 and 17-10-67 (1982-1997) authorize the filing of an application in the superior court of the county in which the applicant is being detained after "an order has been signed by a judge of the trial court setting a time period for the execution." The application must "clearly set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed." The application shall also "have attached thereto affidavits, records, or other evidence supporting its allegations," and must be verified with the oath of

the applicant or of some other person in his behalf. Ga. Code Ann. § 17-10-66 (1982-1997) provides that "[b]y filing an application under this article, the applicant specifically consents to submit to a state examination for the purposes of assessing mental competency to be executed." Ga. Code Ann. § 17-10-66 further authorizes the appointment of an expert to examine the applicant. Ga. Code Ann. § 17-10-65 (1982-1997) permits the respondent to answer the application. Upon the filing of an answer, the court "shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously."

Ga. Code Ann. § 17-10-68 (1982-1997) permits the court to receive proof by "depositions, oral testimony, sworn affidavits, or other evidence." Section 17-10-68 further requires the court to make "written findings of fact and conclusions of law upon which the judgment is based." If the court finds that the applicant has proven his or her mental incompetence to be executed by a "preponderance of the evidence," the court must "enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper."

Ga. Code Ann. § 17-10-69 (1982-1997) provides that if the applicant has previously filed an application under this article and has been previously determined to be mentally competent to be executed, such prior adjudication "shall act as a presumption of mental competency and the applicant shall not be entitled to a new hearing on the question of mental competency to be executed absent the applicant's making a prima-facie showing of a substantial change in circumstances sufficient to raise a significant question as to the applicant's mental competency to be executed at the time of filing of any subsequent applications." Ga. Code Ann. § 17-10-70 (1982-1997) prohibits the filing of

an appeal by the applicant unless the applicant first obtains a certificate of probable cause for the appeal from the Supreme Court.

IDAHO, Idaho Code § 18-210 (1948-1997) provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 18-211 provides that "[w]henever there is reason to doubt the defendant's fitness to proceed as set forth in section 18-210," the court shall appoint at least one psychiatrist or psychologist to "examine and report upon the mental condition of the defendant to . . . understand the proceedings." The defendant is permitted to be examined by an expert of his own choice, and such examiner shall be permitted to have reasonable access to the defendant for the purpose of examination.

Idaho Code § 18-212 (1948-1997) provides that, "[w]hen the defendant's fitness to proceed is drawn in question," the issue is to be determined by the court. If either the prosecuting attorney or counsel for the defendant contests the finding of the report filed pursuant to section 18-211, the court must hold a hearing on the issue. If the report is received in evidence at the hearing, the party who contests the finding shall have the right to cross-examine the psychiatrist or licensed psychologist who submitted the report and to offer evidence upon the issue. If the court determines that the defendant "lacks fitness to proceed," the execution shall be suspended, and the court shall commit the defendant to the custody of the director of the department of health and welfare for care and treatment at an appropriate facility of the department of health and welfare.

ILLINOIS, Ill. Stat. ch. 730, § 5/5-2-3 (former Ill. Rev. Stat. ch 38, § 1005-2-3 (1985) (as cited in *Ford*, 477 U.S. at 408 n.2), which provided that a person is "unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence," was repealed by P.A. 88-350, § 5, effective January 1, 1994. The provision has not been codified in another section of the Illinois Code.

INDIANA does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. Ind. Code Ann. § 11-10-4-2 (West 1997) generally requires the department of corrections to "provide for the care and treatment of every confined offender who is determined to be mentally ill by a psychiatrist employed or retained by the department." A prisoner may be involuntarily (Ind. Code Ann. § 11-10-4-3 (West 1997)) or voluntarily (Ind. Code Ann. § 11-10-4-4 (West 1997)) transferred to a mental health facility. In the case of a request for a voluntary transfer, the inmate will be examined by a psychiatrist retained by the department of correction who shall report his or her findings to the department. If the report states that the inmate is mentally ill and in need of care and treatment, the department of correction "shall transfer the offender to the division of mental health." In *Ford*, this Court interpreted section 2 of this code as applying to present competency to be executed claims. *See Ford*, 477 U.S. at 408 n.2.

KANSAS, Kan. Stat. Ann. § 22-4006 (1996) authorizes counsel for a convict under sentence of death, or the warden of the correctional institution, to request a determination of the convict's sanity by a district judge of the judicial district in which such convict was tried and sentenced, at any time prior to execution. If the district judge determines that there is "sufficient reason

to believe that the convict is insane," the judge shall "suspend the execution and conduct a hearing to determine the sanity of the convict." The judge must order a psychiatric or psychological examination of the convict by two licensed physicians or licensed psychologists. Subdivision (b) of § 22-4006 provides that the death row inmate "shall have the right to present evidence and cross-examine any witnesses at the hearing." Subdivision (d) states that if the judge determines the convict is insane, the judge shall suspend the execution until further order. Further, any time thereafter when the judge has "sufficient reason to believe that the convict has become sane," the judge shall again "determine the sanity of the convict" as provided by this section. "Proceedings pursuant to this section may continue to be held at such times as the district judge orders until it is either determined that such convict is sane or incurably insane." *Id.*

KENTUCKY, Ky. Rev. Stat. Ann. § 431.240 (Michie 1971-1996) provides that the execution of an insane prisoner shall be suspended "until the condemned is restored to sanity." The commissioner of the Department of Corrections may transfer the condemned person to the state forensic psychiatric facility until the time he or she is restored to sanity. The statute further provides that "[a]ny administrative hearings authorized under authority of this section shall be conducted in accordance with KRS Chapter 13B." The Kentucky Department of Corrections Administrative Regulation 501 KAR 8:010 authorizes a condemned person "seeking to have a scheduled execution date stayed pursuant to [Ky. Rev. Stat. Ann.] § 431.240(2) based on an allegation the condemned person is insane," to file a petition for an administrative hearing with the warden of the Kentucky State Penitentiary. The petition must allege "with specificity" the grounds in support of a

belief the condemned is insane, and be accompanied by "at least one . . . affidavit setting forth facts known to the affiant which allegedly establish probable cause to believe the condemned person is insane." Regulation 501 KAR 8:010 requires the warden to either deny the petition or grant a hearing within 24 hours after the petition has been filed. That section further provides, "[a] ruling denying the petition without a hearing pursuant to this Section shall be the final order of the agency subject to judicial review." If a hearing is granted, the provisions of Ky. Rev. Stat. Ann. § 13B.010-13B.170 shall govern the hearing. The Department of Corrections regulation does not limit the "Governor of the Commonwealth or any court of this Commonwealth in the exercise of any powers they may have to act in any other manner under the law or Constitution of Kentucky."

LOUISIANA has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *State v. Allen*, 204 La. 513, 515, 15 So.2d 870, 871 (1943); *see Ford*, 477 U.S. at 408 n.2. The procedures for raising the issue of a defendant's mental capacity to be executed are the same as that for a non-capital defendant. *Allen*, 204 La. at 517. La. Code Crim. Proc. Ann. art. 642 (West 1997) authorizes the defense, the district attorney, or the court to raise defendant's mental incapacity to proceed "at any time." When the question of the defendant's mental incapacity to proceed is raised, there shall be "no further steps in the criminal prosecution," until the defendant is found to have the mental capacity to proceed. La. Code Crim. Proc. Ann. art. 643 (West 1997) requires the court to order a mental examination of the defendant when it has "reasonable ground to

doubt the defendant's mental capacity to proceed." Article 643 further requires the court to appoint counsel to represent the defendant if he has not already retained counsel. La. Code Crim. Proc. Ann. art. 644 (West 1997) mandates the appointment of a "sanity commission" to "examine and report upon the mental condition of the defendant." The sanity commission consists of at least two and not more than three physicians who are qualified by training or experience in forensic evaluations. La. Code Crim. Proc. Ann. art. 647 (West 1997) provides that the issue of the defendant's mental capacity to proceed shall be determined by the court in a "contradictory hearing." The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Further, article 647 permits the introduction of "other evidence pertaining to the defendant's mental capacity to proceed" at the hearing.

La. Code Crim. Proc. Ann. art. 648 (West 1997) provides that the "criminal prosecution" shall be resumed unless the court determines by "clear and convincing evidence" that the defendant does not have the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the "proceedings" shall be suspended.

MARYLAND, Md. Ann. Code art. 27, § 75A (1978-1997) provides that an incompetent inmate is one "who, as a result of a mental disorder or mental retardation, lacks awareness: 1. Of the fact of his or her impending execution; and 2. He or she is to be executed for the crime of murder." The execution of such an inmate is forever prohibited, and the incompetent is thereby sentenced to life imprisonment. Md. Ann. Code art. 27, §75A(c) authorizes the inmate, the inmate's counsel, or

if the inmate is not represented by counsel, any other person on the inmate's behalf, to file a petition alleging that the inmate is incompetent and seeking to revoke the warrant to execute the death sentence. "Upon the filing of such a petition, the court may in its discretion stay any warrant of execution that was previously issued and has not yet expired." Unless the inmate is already represented by counsel, the court "shall promptly appoint the public defender, or . . . other counsel to represent the inmate in the proceeding." The inmate must submit to an examination and evaluation by one or more psychiatrists of the State's choosing, and the inmate is entitled to be independently examined by a psychiatrist of the inmate's choosing. Unless the parties waive a hearing, an evidentiary hearing will be held to determine the inmate's competence. Md. Ann. Code art. 27, §75A(c)(9) provides that at the hearing, the inmate has the right to be present, to offer evidence, cross-examine witnesses, and make argument. The inmate has the burden of establishing incompetence by a "preponderance of the evidence." If the court finds the inmate to be incompetent, it must stay any warrant of execution and remand the case to the court in which the sentence of death was imposed. That court must "strike the sentence of death and enter in its place a sentence of life imprisonment without the possibility of parole."

MISSISSIPPI, Miss. Code Ann. § 99-19-57(2) (1996) provides that if a convict under a sentence of death becomes insane, the provisions of that section "shall be the exclusive procedural and substantive procedure." Under section 99-19-57(2)(b), a person shall be deemed "insane" if the court finds the convict "does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which

awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court." Section 99-19-57(2)(a) authorizes "[t]he convict, or a person acting as his next friend, or the commissioner of corrections" to file an application seeking post conviction relief with the Mississippi Supreme Court. If the court finds the inmate to be insane, execution of the sentence must be suspended. The inmate will then be committed to the state hospital until the inmate regains his or her sanity.

MISSOURI, Mo. Ann. Stat. § 552.060 (Vernon 1997) provides, "[n]o person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." Section 552.060 requires the director of the department of corrections to "immediately" notify the governor if the director has "reasonable cause" to believe that any inmate sentenced to death has a mental disease or defect excluding fitness for execution. The governor must "forthwith order a stay of execution of the sentence" if there is not sufficient time between such notification and time of execution for a determination of the mental condition of such person without such stay. Each of the parties is entitled to an examination by a physician of their own choosing. The circuit court must then conduct an "inquiry" into the mental condition of the capital inmate. Section 552.060 further provides that "[i]f the court, after such inquiry, certifies to the governor and to the director that the prisoner has a mental disease or defect . . . the offender shall not be executed but shall be held in the correctional facility

subject to transfer to a mental hospital." If the offender is thereafter certified by the director as free of a mental disease or defect, the governor "shall fix a new date for the execution." Section 552.060 also provides, "[n]othing in this chapter shall be construed to limit the governor or any court in the exercise of any of their powers in any other manner under the law or Constitution of Missouri."

MONTANA, Mont. Code Ann. § 46-19-201 (1996) provides, "If after judgment of death there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 14 of this title." Mont. Code. Ann. § 46-14-221 (1996) (chapter 14) permits "[t]he issue of the defendant's fitness to proceed" to be raised by the court, the defendant, the defendant's counsel, or by the prosecutor. When the issue is raised, it must be determined by the court. The court may make the determination of the defendant's fitness based on the findings of the mental health experts' reports filed pursuant to section 46-14-206 if "neither the prosecutor nor the defendant's counsel contests the finding of the report." If either party contests the finding in the report, the court is required to hold a hearing. If the report is received in evidence, the parties have the right to "subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue." Mont. Code Ann. § 46-19-202 (1996) provides that, "[i]f it is found that defendant [sentenced to death] is mentally fit . . . the warden of the Montana state prison shall execute the judgment." If the defendant is found to be unfit to proceed, the execution of judgment must be suspended and the court must commit the defendant to the state hospital "for as long as the lack of fitness endures."

Subsection (3) of section 46-19-202 states that when the court, "on its own motion or upon application of the superintendent of the Montana state hospital, the county prosecuting officer, or the defendant or the defendant's legal representative, determines after a hearing . . . that the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution." Section 46-19-202 further provides, "If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to proceed with execution of the sentence," the court may suspend the execution of the sentence and may order the defendant to be discharged.

NEBRASKA, Neb. Rev. Stat. § § 29-2537 (1996) provides, "If any convict under sentence of death shall appear to be mentally incompetent," the warden must notify a judge of the district court of the judicial district in which the convict was tried and sentenced. The judge is required to make "such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict." If the judge determines that there is not sufficient reason for the appointment of a commission, the judge may refuse to suspend the execution of the inmate. If the judge determines that a commission should be appointed to examine the inmate, if necessary the judge "shall suspend the execution" and appoint the "three superintendents of the state centers at Lincoln, Hastings, and Norfolk" as a commission to examine the convict. The commission is required to examine the inmate to determine whether he or she is mentally competent or incompetent. "If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order." If, at "[a]ny time thereafter," it is "made to appear" to

the judge that the inmate has become mentally competent, the judge must again appoint a commission who must make another investigation as to the mental competency of the inmate. "Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent."

NEVADA, Nev. Rev. Stat. Ann. § 176.415 (Michie 1995) provides that the execution of the death penalty may be stayed pending the investigation into the sanity of the convicted inmate. Nev. Rev. Stat. Ann. § 176.425 (Michie 1995) provides that if there is "good reason to believe" that a defendant sentenced to death has become insane, the director of the department of prisons may petition a district judge "in writing, verified by a physician," and alleging the present insanity of the capital inmate. The judge must then appoint two psychiatrists and/or psychologists to examine the inmate and conduct a hearing to determine whether the inmate is insane. The judge may stay the execution pending the determination of the sanity of the inmate if he or she determines that the hearing and the determination cannot be had before the date of the execution. Nev. Rev. Stat. Ann. § 176.435 (Michie 1995) requires the attendance of the capital inmate and the attorney general or his deputy at the hearing. The district attorney and defense counsel may also attend the hearing. The report of the examining physicians must be submitted to the court which may require the production of "other evidence." The attorney for the capital inmate, or such inmate if he or she is without counsel, is permitted to "introduce evidence and cross-examine any witness, including the examining physicians." Nev. Rev. Stat. Ann. § 176.455 (Michie 1995) provides that, if the court finds the convicted person to be insane, the judge "shall make and enter an

order staying the execution of the judgment of death until the convicted person becomes sane," and order the director of the department of prisons to confine such person in a "safe place of confinement until his reason is restored."

NEW HAMPSHIRE does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. N.H. Rev. Stat. Ann. § 651:10 (1995) authorizes the governor and council, or the superior court, to transfer any prisoner who is insane to the "secure psychiatric unit," whenever they are "satisfied that such . . . transfer will be conducive to the health and comfort of the person and the welfare of the public."

NEW JERSEY, N.J. Stat. Ann. § 30:4-82 (West 1981), as cited in *Ford, supra*, 477 U.S. at 408 n.2, was repealed in 1989 by L.1987, c. 116, § 30. New Jersey does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence.

However, N.J. Stat. Ann. § 30:4-27.1 (West 1997) provides procedures for involuntary confinement of mentally ill inmates who are a danger to themselves or to others. N.J. Stat. Ann. § 30.4-27.10(a), (d) allow commitment proceedings to be initiated by psychiatric personnel or by the New Jersey Attorney General. Upon receiving documents in support of commitment, the trial court must immediately review them to determine if there exists probable cause to believe that the person is in need of involuntary confinement. *Id.* §30:4-27.10(f). If the court finds that there is probable cause to believe that the inmate is in need of involuntary commitment, then the court shall authorize the admission of the inmate into a facility pending a final hearing. *Id.* § 30.4-27.10(g). (Death row inmates

may remain on death row while receiving psychiatric treatment. *Matter of Savage*, 558 A.2d 1357, 1359-60 (N.J. App. Div. 1989).) An inmate subject to involuntary commitment receives a hearing within 20 days regarding the necessity of continued commitment at which he receives the opportunity to representation by counsel, to present evidence, and to cross-examine witnesses. *Id.* §30.4-27.12(a), .14, .15(d). If the court finds that the inmate no longer needs continuing treatment, it must order him to be returned to the appropriate prison to continue serving his or her sentence. *Id.* § 30.4-27.15(d).

NEW MEXICO, N.M. Stat. Ann. § 31-14-4 (1978-1997) provides, "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane," the warden must notify the district attorney. The district attorney must "immediately file in the district court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into." It is the "duty of said court to inquire into said question and render judgment thereon." N.M. Stat. Ann. § 31-14-5 (1978-1997) requires the district attorney to attend the hearing, who "may produce witnesses before the court." N.M. Stat. Ann. § 31-14-6 (1978-1997) provides that if the court finds the capital inmate to be insane, the inmate must be taken to the state hospital "and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. § 31-14-7 (1978-1997) requires suspension of the execution if the capital inmate is found to insane. The court must then deliver the inmate to the superintendent of the state hospital for the insane. "When the defendant recovers his reason, the superintendent of such hospital must certify that fact

to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment."

NEW YORK, N.Y. Correct. Law § 656 (McKinney 1997) prohibits the state from executing a capital inmate who is incompetent. Section 656 states that an inmate is "incompetent" when, "as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out." Upon the filing of a petition in the supreme court, the court "shall issue an order staying the execution if and to the extent a stay is necessary to permit determination of the petition." The court must also appoint a commission of three psychiatric examiners to inquire into the inmate's competence and report to the court as to their findings. The examination of the capital inmate must "promptly take place with all three of the psychiatric commissioners present at the same time." Section 656 also authorizes, upon application of the inmate or the district attorney, an examination by a psychiatrist or psychologist designated by the inmate or the district attorney. Section 656 requires the appointment of counsel upon the filing of a petition if the inmate does not have counsel and is financially unable to obtain counsel. Subdivision four of § 656 requires the psychiatric commissioners to "receive and consider evidence" offered by the inmate's counsel and the district attorney, including "written submissions, testimony and expert psychiatric evidence." The parties have the right to cross-examine witnesses at the proceeding before the psychiatric commissioners. Section 656 provides that if a majority of the psychiatric commissioners finds the inmate to be incompetent, the court must accept such finding "unless clearly erroneous." The court must then enter an order finding the inmate to be incompetent

and stay the execution of the inmate. If the court rejects, however, the finding of a majority of the psychiatric commissioners on the ground that it is clearly erroneous, the court is required to appoint another commission to proceed as provided in § 656. Section 656 further provides, "Any other provision of law notwithstanding, no other review, judicial or otherwise, shall be available with respect to an order finding the inmate to be incompetent or competent." However, subsequent petitions may be filed in the supreme court. Upon the filing of a subsequent petition, the court may not issue an order staying the execution of the inmate unless the court finds that there is "reasonable cause to believe that the inmate is incompetent."

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1001(a) (1944-1996) provides that, "[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C. Gen. Stat. § 15A-1002 (1944-1996) provides that incapacity to proceed may be raised "at any time" on motion by the prosecutor, the defendant, the defense counsel, or the court. N.C. Gen. Stat. § 15A-1002(b) requires the court to hold a hearing to determine the defendant's capacity to proceed. The court is authorized to appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. If the report indicates that the defendant lacks capacity to proceed, "proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted." The court may make "appropriate temporary orders for the confinement or security of the

defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed."

OHIO, Ohio Rev. Code Ann. § 2949.28 (Baldwin 1997) presently provides, "If a convict sentenced to death appears to be insane, the warden . . . shall give notice thereof to a judge of the court of common pleas of the county in which the prisoner is confined." The judge must then "inquire into such insanity" or impanel a jury for that purpose. Section 2949.28 further mandates that execution of the sentence "shall be suspended pending completion of the inquiry."

As of the date of the filing of this Appendix, a proposed amendment to Ohio Rev. Code Ann. § 2949.28 has passed the Ohio Senate. It would add the following provision: "(A) As used in this section and section 2949.29 of the Revised Code, 'insane' means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict." The present version of section 2949.28 would then be amended as follows: "(B)(1) If a convict sentenced to death appears or claims to be insane, the warden . . ., the convict, the convict's counsel, or a psychiatrist or psychologist who has examined the convict shall give notice of the apparent or claimed insanity to whichever of the following is applicable: (a) if the convict was tried by a jury, to the judge who imposed the sentence upon the convict or, if that judge is unavailable, to another judge of the same court of common pleas; (b) if the convict was tried by a three-judge panel, to any of the three judges who imposed the sentence upon the convict or, if each of those judges is unavailable, to another judge of the same court of common pleas." Subdivision (2) of the proposed amendment to § 2949.28(B) requires the

judge to inquire into the convict's sanity and to give notice of the inquiry to the convict and the convict's counsel in addition to the prosecuting attorney. As in the current provision, the proposed amendment would require execution of the sentence "be suspended pending completion of the inquiry." Additionally, subdivision (2) of the proposed amendment would require the court to appoint counsel to represent the convict in the inquiry, and to appoint one or more psychiatrists to examine the convict.

Ohio Rev. Code Ann. § 2949.29 (Baldwin 1997) currently provides that the "warden or sheriff, the judge of the court of common pleas, clerk of the court of common pleas, and prosecuting attorney" must attend the inquiry commenced as provided in § 2949.28 of the Revised Code. "Witnesses may be produced and examined before the judge or jury, and all findings shall be in writing signed by the judge or jury. If it is found that the convict is not insane, the sentence shall be executed at the time previously appointed, unless such time has passed pending completion of the inquiry, in which case the judge conducting the inquiry shall appoint a time for execution. If it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution as provided in section 2949.30 of the Revised Code."

As of the date of the filing of this Appendix, a proposed amendment to Ohio Rev. Code Ann. § 2949.29 has passed the Ohio Senate. Pursuant to the proposed amendment, § 2949.29 would read as follows:

> (A) The prosecuting attorney, the convict, and the convict's counsel shall attend an inquiry commenced as provided in section 2949.29 of the Revised Code. The prosecuting attorney

> and the convict or the convict's counsel may produce, examine, and cross-examine witnesses, and all findings shall be in writing signed by the judge. If it is found that the convict is not insane, the sentence shall be executed at the time previously appointed, unless that time has passed pending completion of the inquiry, in which case the judge conducting the inquiry shall appoint a time for execution not to exceed 10 days from the finding of the court.
>
> (B) If it is found that the convict is insane, the judge shall continue the stay of execution of sentence previously issued, order the convict to be confined in the area to which other convicts sentenced to death are confined, and order treatment of the convict. Thereafter, the court at any time may conduct and, on motion of the prosecuting attorney, shall conduct a hearing to continue the inquiry into the convict's insanity. If the court finds at the hearing that the convict is not insane and if the time previously appointed for execution of the sentence has not passed, the sentence shall be executed at the previously appointed time. If the court finds at the hearing that the convict is not insane and if the time previously appointed for execution of the sentence has passed, the judge who conducts the hearing shall appoint a new time for the execution not to exceed 10 days from the finding of the court.
>
> (C) In all proceedings under this section and section 2949.28 of the Revised Code, the burden of proof of insanity is upon the convict by a preponderance of the evidence, and the

court shall find that the convict is not insane unless the court finds by a preponderance of the evidence that the convict is insane.

(D) Proceedings for inquiry into the insanity of any convict sentenced to death shall be exclusively pursuant to this section, section 2949.28 of the Revised Code, and the Rules of Evidence. Neither Chapter 5122. or 5123. of the Revised Code nor any other provision of the Revised Code or any other rule concerning mentally ill persons, mentally retarded persons, or insane persons applies to any proceeding for inquiry into the insanity of any convict sentenced to death.

(E) The appellate court in which the appeal is filed shall expedite any appeal from a decision rendered pursuant to this section or section 2949.28 of the Revised Code. No court shall order a stay of execution exceeding sixty days pending the appeal.

Ohio Rev. Code § 2949.30 (Baldwin 1997) provides that if a convict under sentence of death is found insane under § 2949.29 of the Revised Code, and if he is subsequently restored, the warden must notify the governor who "when convinced that the convict is of sound mind," shall issue a warrant appointing a time for his execution.

OKLAHOMA, Okla. Stat. Ann. tit. 22, § 1005 (West 1997) requires that once there is "good reason" to believe that a capital inmate has become insane, the warden must notify the district attorney of the county in which the prison is situated. The district attorney must "immediately" file in the district or superior court of

such county a petition "stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into." The court must "at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry." Okla. Stat. Ann. tit. 22, § 1006 (West 1997) requires the attendance of the district attorney at the inquisition. The district attorney may produce witnesses at the hearing. Okla. Stat. Ann. tit. 22, § 1007 (West 1997) requires that if the capital inmate is found to be insane, the court must order that he or she be taken to one of the state hospitals for the insane and "there kept for safe confinement until his reason is restored." Okla. Stat. Ann. tit. 22, § 1008 (West 1997) further provides that if the capital inmate is found to be sane, the warden "must proceed to execute the judgment." If the inmate is found to be insane, the warden "must suspend the execution" and "deliver the defendant . . . to the superintendent of the hospital." Upon the recovery of the inmate's sanity, the Governor must issue to the warden a warrant appointing a day for the execution of the judgment.

OREGON has no statute or case law explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence.

PENNSYLVANIA has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *Commonwealth v. Jermyn*, 539 Pa. 371, 374, 652 A.2d 821, 822-23 (1995); *Commonwealth v. Moon*, 383 Pa. 18, 22, 117 A.2d 96, 99 (1955). An inmate may receive an evidentiary hearing in front of the Court of Common Pleas in order to

litigate his competency to be executed. *See Jermyn*, 539 Pa. at 373, 375-6.

SOUTH CAROLINA does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. S.C. Code § 17-27-160 (1996) provides capital case post-conviction relief procedures. S.C. Code § 44-23-220 (1996) provides generally that, "[n]o person who is mentally ill or mentally retarded shall be confined for safekeeping in any jail." That section authorizes an examination of the person, and if in the opinion of the two examiners designated by the Department of Mental Health admission to a mental health facility is warranted, the officer in charge of the jail "shall commence proceedings pursuant to Sections 44-17-510 through 44-17-610, or Section 44-21-90." This Court has interpreted this latter code section as being applicable to competency to be executed claims. *See Ford*, 477 U.S. at 408 n.2.

SOUTH DAKOTA, S.D. Codified Laws § 23A-27A-22 (1968-1997) provides that if a capital inmate "appears to be mentally incompetent to proceed," the warden must notify the Governor "forthwith." The Governor is required to appoint a commission of three to five physicians to examine the inmate and report to the Governor as to the capital inmate's mental condition at the time of the examination. S.D. Codified Laws § 23A-27A-23 (1968-1997) requires the commission to "take the oath required of referees as prescribed by the Supreme Court rule for trial courts of record." The commission must give at least seven days' notice of the time of such examination to the attorney general, the state's attorney who tried or participated in the trial of the inmate, and counsel for the capital inmate. The attorney general or one of his assistants or the state's attorney or a deputy must, and counsel for the inmate

may, attend the examination, and any of the attorneys "may take part in the proceedings before the commission." The commission is authorized to "call and examine witnesses, administer oaths and compel the attendance of witnesses." After the examination has been completed, the commission must submit a written report to the Governor with the opinion of the commission as to the mental condition of the capital inmate. S.D. Codified Laws § 23A-27A-24 (1968-1997) provides that the Governor "shall suspend the execution of sentence" if the commission finds the defendant mentally incompetent to proceed. Thereafter, the commission must review the defendant's mental condition at least once every six months during his confinement.

TENNESSEE does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. But Tennessee has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *Jordan v. State*, 124 Tenn. 81, 89-90, 135 S.W. 327, 329 (1911).

TEXAS currently does not have a statute explicitly requiring the suspension of the execution of a capital inmate who meets the legal test for incompetence. At common law, Texas forbade execution of the insane, and the 1879 through 1965 Codes of Criminal Procedure all contained statutes explicitly barring execution of the insane and setting out the general procedures to be followed once the issue was raised. *Ex parte Jordan*, 758 S.W.2d 250, 253 (1988). However, in 1975, the legislature "completely rewrote [Tex. Code

Crim. Proc. Ann., Art.] 46.02 and inexplicably omitted the section dealing with execution competency." *Id.*

Tex. Code Crim. Proc. Ann. art. 46.01, Sec. 2.(a) (West 1997) provides that a prisoner "not under death sentence" may be transferred to a state mental hospital if a prison physician is of the opinion that the prisoner is mentally ill and would benefit from treatment in a mental hospital. As did the court in *Ex parte Jordan*, 758 S.W.2d at 254 n.8, amici note herein that *Ford*, 477 U.S. at 408 n.2, incorrectly cites Tex. Code Crim. Proc. Ann. art. 46.01 as an example of a State statute which provides for suspension of execution and transfer to a mental facility for a capital inmate who has developed mental illness.

Nevertheless, the Texas Court of Criminal Appeals in *Ex parte Jordan* reaffirmed the common law rule that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. Further, the *Jordan* court approved the following procedures as "comport[ing] with the constitutional considerations discussed in *Ford*" for determining whether a capital inmate is competent to be executed (*Ex parte Jordan*, 758 S.W.2d at 254): (1) a capital inmate may file a postconviction application for writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. arts. 11.07 and/or 11.071 (West 1997). (2) Once the competency issue has been raised, the trial court should appoint an independent psychologist to examine the applicant. (3) Following the examination, the trial judge should afford the applicant a "full adversarial hearing" to determine his or her competency. (4) At the hearing, the applicant is entitled to counsel, and given an "opportunity to be heard, present evidence, and cross-examine witnesses." (5) The judge must determine whether the applicant is "capable of comprehending the nature, pendency and

purpose of his execution." (6) If the judge finds the capital inmate to be incompetent, a stay of execution is authorized pending regained competency. (7) The judge should order a re-evaluation of the inmate every ninety days. (8) A capital inmate is not entitled to a transfer to a mental hospital for treatment, but rather is only entitled to treatment using prison's in-house resources. *Id.* at 251, 254.

UTAH, Utah Code Ann. § 77-19-8 (1953-1997) provides that the execution of a judgment of death may be suspended in cases of "suspected incompetency." Utah Code Ann. § 77-19-13 (1953-1997) provides that if there is "good reason" to believe the capital inmate is incompetent to proceed, the executive director of the Department of Corrections must immediately give written notice to the court in which the judgment of death was rendered, the prosecuting attorney, and counsel for the inmate. The judgment will be stayed pending further order of the court. Section 77-19-13(2)(a) requires an examination of the mental condition of the capital inmate. If the inmate is found incompetent, the court must "immediately transmit a certificate of the findings to the Board of Pardons and Parole and enter an order for commitment under Title 77, Chapter 15."

VIRGINIA has no statute or case law explicitly concerning the suspension of the execution of a capital inmate who meets the legal test for incompetence. Va. Code § 19.2-177.1 (1949-1997) (former Va. Code § 19.2-177) does provide generally that the person having custody over an inmate may petition for a mental commitment proceeding in accordance with the procedures provided in Chapter 2 (§ 37.1-63 et seq.) of Title 37.1. But, the Virginia Supreme Court ruled in July of 1987 that section 19.2-177, cited in *Ford, supra*,

477 U.S. at 408 n.2 and the direct ancestor of the present statute, did not apply to death penalty cases. *Whitley v. Commonwealth*, (Va. Sup. Ct. Order, Rec. No. 870704, July 2, 1987).

WASHINGTON has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *State v. Harris*, 114 Wash.2d 419, 437, 789 P.2d 60, 70 (1990); *State v. Davis*, 6 Wash.2d 696, 717, 108 P.2d 641, 651 (1940).

Independent of any statutory authority, Washington state courts "possess an inherent power to act upon a showing of supervening insanity, and if necessary, to issue a stay of execution to permit a proper and adequate investigation to be made." *Davis*, 6 Wash.2d at 717. In *Harris*, the Washington Supreme Court set out the procedures for adjudicating competency to be executed claims.

The *Harris* court observed that death row inmates would be deemed competent to be executed "if they understand that they have been sentenced to death for murder and can communicate rationally with counsel." *Harris*, 114 Wash.2d at 427. A claim of competency to be executed may be raised in the Washington Superior Court. *Id.*, at 437-8. The superior court may stay a capital inmate's execution while its inquiry is in process. *Id.* The superior court may grant an evidentiary hearing on a claim of competency to be executed if the inmate makes a "substantial showing" that he is presently insane for purposes of execution. That showing may be made by "affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present sanity." *Id.*, at 435-36. If the court decides that the capital inmate's showing is

insufficient, the court "shall enter an appropriate order, supported by detailed findings of fact, denying the motion for a hearing." *Id.*, at 436.

If the capital inmate has shown that he is entitled to an evidentiary hearing, the inmate is entitled to notice of the hearing, to be present at the hearing, to be represented by counsel, to present all material relevant evidence and argument necessary to overcome the "strong presumption of sanity," and to cross-examine the opposing party's witnesses. *Id.*, at 436, 439-40. The court's conclusion regarding the inmate's competency shall be a "finding of fact." *Id.*, at 440. This finding of fact shall be detailed and in writing. *Id.*

The Washington Supreme Court "shall expedite appellate review" of competency to be executed claims. *Id.*, at 441. "Procedural error . . . should be reviewed as a question of law. However, the court's findings of fact on disputed facts, including the court's ultimate finding on petitioner's sanity or insanity, would not be disturbed on review if supported by substantial evidence." *Id.* If the capital inmate is found to be incompetent to be executed, he may, at the option of the Department of Corrections, be transferred to a state hospital for treatment provided he receives a judicial adversarial hearing regarding the need for treatment. *Id.*, at 442. Or, he may be committed under state statutes providing for the commitment of the mentally ill. *Id.*, at 442-3.

Finally, the *Harris* court provided that if "submissions" by the parties to the superior court "indicate[d] the defendant had regained his competency, a hearing could be held to determine whether the stay [of execution] should be dissolved." *Id.*, at 443.

WYOMING, Wyo. Stat. § 7-13-901 (1977-1997) defines "[r]equisite mental capacity" as "the ability to understand the nature of the death penalty and the reasons it was

imposed." Subdivision (b) of that section provides that if it "appears to any custodian or other interested person" that a capital inmate "does not have the requisite mental capacity," the custodian or interested person must "immediately give notice in writing to the court." The notice to the court must be accompanied "by all psychiatric or psychological reports or evaluations made of the convict since the imposition of the death sentence." Wyo. Stat. § 7-13-902 (1977-1997) authorizes the court, upon a finding that "there is reasonable cause to believe that the convict does not have the requisite mental capacity," to stay the execution and order an examination of the inmate. Within five (5) days after receiving a copy of the report of the examination of the capital inmate, the inmate's counsel or the state may obtain an order granting them an examination by a designated examiner of their own choosing. Subdivision (e) of section 7-13-902 provides that if the opinion contained in the examination report is contested by any party, the court must conduct a hearing. At the hearing, the parties are authorized to "summon and cross-examine the persons who provided the report or rendered opinions contained therein and offer evidence upon the issue of the convict's requisite mental capacity." Section 7-13-902(f) provides that upon "clear and convincing evidence" that the capital inmate does not have the requisite mental capacity, the judge "shall suspend the execution" of the inmate "until a time when it is found that the convict has the requisite mental capacity." Section 7-13-902(h) requires the appointment of counsel to represent the inmate during the proceedings if he or she is not already represented. Section 7-13-902(j) provides that the capital inmate "shall have an opportunity to be heard either personally or through his counsel" at the competency hearing. Further, the inmate may introduce "any relevant evidence bearing upon the convict's requisite mental

capacity." Wyo. Stat. § 7-13-903 (1977-1997) reiterates that the capital inmate's execution must be suspended if the court finds that the inmate does not have the requisite mental capacity. Section 7-13-903 further provides that "a designated examiner shall reexamine the convict at least every twelve (12) months at the direction of the court." A new hearing must be commenced when the designated examiner determines after the examination required by section 7-13-903 "that the conditions justifying the suspension of the execution of the death sentence no longer exist."

No. 97-300 (9)

Supreme Court, U.S.
FILED
DEC 22 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

—v.—

RAMON MARTINEZ-VILLAREAL,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many of this Court's most important habeas corpus cases, including, most recently, *Felker v. Turpin*, __ U.S. __, 116 S.Ct. 2333 (1996).

STATEMENT OF THE CASE

The respondent, Ramon Martinez-Villareal, was convicted of murder and sentenced to death. He brought this habeas petition alleging that he is now mentally incompetent and that his execution would therefore be unconstitutional under this Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986). That allegation has yet to be tested in these proceedings. Instead, the state has argued that respondent's claim cannot even be heard.

The consequence of this position, of course, is that the state may well be on the verge of executing a man who cannot constitutionally be executed based on well-established precedents that the state does not dispute. Nevertheless, the state insists that respondent's *Ford* claim must be dismissed without reaching the merits, because the Anti-Terrorism and

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Effective Death Penalty Act, 28 U.S.C. §§2244(b)(1) & (2), bars a federal district court from considering "successive" applications except under limited circumstances not present here.

The state takes this position despite the circuit court's holding that Mr. Martinez-Villareal's petition is not a successive application at all. Mr. Martinez-Villareal did file a previous petition advancing various challenges to his conviction and the *imposition* of his sentence.[2] In this action, however, he advances a *Ford* claim, which goes not to those previous judgments, but rather to the *administration* of his death sentence. In rejecting the state's characterization of Mr. Martinez-Villareal's application as "successive," the circuit court merely allowed him *one chance* to advance his *Ford* claim in the district court. *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997).

Mr. Martinez-Villareal's brief concentrates on the question now squarely before this Court: whether the circuit court reached the right result as a matter of statutory construction. This brief focuses on the state's contention that, in reaching its judgment, the circuit erroneously relied on the familiar rule that courts should construe statutes to avoid constitutional questions.

SUMMARY OF ARGUMENT

This is a straightforward statutory construction case. All that needs to be decided is whether the circuit court correctly construed §§2244(b)(1) & (2). The state nonetheless invites this Court to undertake an examination of the Suspension Clause. To do so would require the Court to revisit

[2] Mr. Martinez-Villareal's effort to raise the *Ford* claim in his first habeas petition was dismissed as premature by the district court at the state's urging.

delicate problems that have long baffled and divided students of the federal courts. The circuit court properly invoked the general rule that statutes should be construed to avoid serious constitutional problems. That was error only if no such problems exist. The state's elaborate brief not only fails to dispel doubts about the meaning of the Suspension Clause, but actually demonstrates the existence of the very problems it hopes to deny.

Although we agree with the circuit court's disposition of the statutory construction question, we disagree with its suggestion that, if §§2244(b)(1) & (2) are construed the way the state suggests, they would deprive this Court of jurisdiction to entertain Mr. Martinez-Villareal's claim as an original habeas matter. 118 F.3d at 631. In our view, this Court would have power to address Mr. Martinez-Villareal's claim in an original habeas petition, even if the district court did not. But the formal availability of that vehicle for Article III adjudication does not eliminate potential Suspension Clause questions and thus does not render erroneous the circuit court's reliance on the avoidance principle.

ARGUMENT

I. THE STATE'S ATTEMPT TO TURN A STATUTORY CONSTRUCTION CASE INTO A VEHICLE FOR EXPLORING THE SUSPENSION CLAUSE IS BOTH UNNECESSARY AND IMPROPER

As Mr. Martinez-Villareal demonstrates in the party brief, his petition is not "successive" by any plausible construction of the controlling statutes, including §§2244(b)(1) & (2). To the contrary, this is his *initial* opportunity to put his *Ford* claim before the federal courts. To read the habeas statutes the way the state insists they must be read, this Court must accept two startling arguments: First, the Court

must accept the state's contention that Congress has deprived a federal district court of *any* habeas authority to entertain a *Ford* claim *even once*. Second, the Court must accept the state's contention that legislation of that kind would raise no serious question under the Suspension Clause. U.S. CONST., art. I, §9, cl.2. Neither of those propositions can be sustained.[3]

Mr. Martinez-Villareal effectively refutes the state's attack on the circuit court's construction of §§2244(b)(1) & (2) and persuasively shows that the circuit court's interpretation is correct and dispositive. It is an interpretation that respects Congress' attempt in the Anti-Terrorism Act to streamline the processing of federal habeas corpus cases without converting the Act into a series of arbitrary forfeiture rules meant to frustrate access to the federal courts at every turn. Contrary to the state's argument, neither §2244 (b)(1) nor §2244(b)(2) "clearly" demonstrates that Congress has unilaterally foreclosed *Ford* claims from habeas -- without the slightest discussion or explanation.

Remarkably, the state scarcely attends to the statutory construction question at all. It simply announces that §2244(b) "specifically requires" that Mr. Martinez-Villareal's petition "be *treated as* a successive petition" -- evidently without regard to whether it actually *is* such a petition. Brief of the Petitioners at 9 (emphasis added). According to the state, the "real question" in this case is "what the Suspension Clause . . . protects." *Id.* at 7. Through this *ipse dixit*, the state has attempted to transmute this straightforward statutory construction case into a vehicle for exploring constitutional questions this Court has left open for two hundred years.

The state's constitutional argument is entirely out of place. The only issue of constitutional moment that can arise in this case is whether the circuit court properly took seriously the Suspension Clause implications of adopting the state's view of these statutes. Having done so, that court merely invoked the most familiar and settled canon of statutory construction: In the absence of clear statutory text to the contrary, a court should construe a statute in a way that avoids "grave and doubtful" constitutional issues.[4] The only constitutional question the circuit's analysis raises, therefore, is whether serious Suspension Clause issues exist.

If the state is to justify any discussion of the Suspension Clause at all, it can do so only by advancing an utterly indefensible position: that it was error for the circuit court even to consider the familiar avoidance principle because no "grave and doubtful" Suspension Clause issue could arise in this case. Initially, the state appears to acknowledge the heroic task it has set for itself. Brief of the Petitioners at 8 (recognizing that the circuit court can be faulted only if "there is no constitutional violation to avoid").[5] Yet it then

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[3] Apart from the Suspension Clause issues that the circuit court expressly noted, the state's interpretation of these statutes would raise other constitutional questions, which are also avoided by the circuit court's construction. According to the state, for example, the new amendments to §2244(b) foreclose Mr. Martinez-Villareal's claim even though it might have been heard under prior law. If that were the case, the new Act might work an arbitrary change in the law in violation of the Due Process Clause. Moreover, if the new Act were read to deny even a single opportunity to raise *Ford* claims in a federal district court, while permitting other claims to be considered, the resulting discrimination would raise additional due process issues.

[4] *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

[5] The state argues that the circuit court should not have invoked the avoidance principle without first reaching an authoritative decision that denying Mr. Martinez-Villareal his day in court would violate the Suspension Clause. Brief of the Petitioners at 19. That is not the law.

(continued...)

devotes the bulk of its brief to a strained (and unsuccessful) attempt to show that its argument is *easy*. If, indeed, the meaning of the Suspension Clause is as free from doubt as the state insists, one would think that it would take a good deal less ink to explain how that is so.

In truth, the Suspension Clause issues the state invites the Court to address in this case are anything but easy. To engage them, the Court would have to grapple with opaque constitutional text, elusive historical evidence, and the most tentative dicta in the precedents.[6] Moreover, all those difficulties would be compounded by the extraordinary implications of reaching an authoritative decision on even a single Suspension Clause issue. Not only fundamental precepts about the structure of the federal system would be at stake, but the role of the federal judiciary in safeguarding liberty of the person. This Court has never found it necessary or prudent to range so widely and deeply before, and it is implausible to propose that this case somehow demands what so many others have not.

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[5] (...continued)
This Court has said on countless occasions that courts should construe statutes to avoid wrestling with "serious constitutional problems." *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This familiar avoidance principle both minimizes the need for constitutional adjudication and vindicates the statute's probable purpose. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)(recognizing that Congress would not lightly enact a statute that raises constitutional difficulties). Neither of those justifying rationales would be served if a court were required actually to reach a constitutional decision before construing a statute to avoid the need for any such decision.

[6] These questions rival in their complexity other constitutional questions touching the federal judiciary that have divided the Court of late. *E.g.*, *Idaho v. Coeur D'Alene Tribe*, __ U.S. __, 117 S.Ct. 2028 (1997)(involving Eleventh Amendment issues); *Seminole Tribe v. Florida*, __ U.S. __,116 S.Ct. 1114 (1996)(same).

The one thing that *is* clear from history and precedent is that the Suspension Clause, like Article III, contributes to a generalized understanding of the role of the federal judiciary within the constitutional framework. The Suspension Clause attaches special significance to cases in which individuals claim they are deprived of their physical liberty in violation of federal law and counsels a healthy suspicion of any argument that the federal courts are without power to entertain such claims. Advocates may toss off cavalier statements that Congress might simply eliminate federal habeas for state prisoners.[7] But Congress itself is far more respectful of the federal courts' longstanding responsibility for liberty of the person in this democracy.

The state itself recognizes that neither the text of the Suspension Clause nor its known and retrievable history throw significant light on its meaning. Brief of the Petitioners at 7 (acknowledging that the Suspension Clause "contains no internal definitions"). In the main, the state simply takes the paucity of probative sources to indicate, evidently by negative inference, that the Suspension Clause means very little. *Id.* at 26-27 (relying on what the surviving records are said *not* to establish). That does not follow. Thin source materials make the interpretive exercise *difficult* and the results *doubtful*. The state thus defeats its own purposes. It concedes the very things it must refute.

Stripped of its conclusory rhetoric, the state's brief is little more than a collection of selected dicta from some of this Court's decisions over the years and a virtual download from a law review article prepared by a former Justice Department lawyer nearly a half century ago.[8] That will not

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[7] *E.g.*, Brief *Amicus Curiae* of the Criminal Justice Legal Foundation at 9.

[8] Rex A. Collings, Jr., "Habeas Corpus for Convicts -- Constitutional (continued...)

do. *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974)(explaining that decisions and opinions that do not face and squarely resolve issues cannot serve as authoritative precedents on those issues). There is much more to say about (and for) the Suspension Clause as a source of federal judicial authority to safeguard liberty of the person.

II. THE STATE'S SUSPENSION CLAUSE ARGUMENT COLLAPSES UNDER ITS OWN WEIGHT

Bearing in mind that the only question is whether "grave and doubtful" constitutional issues exist in the background of this case, the state scarcely speaks to the point at all. By contrast, the state is forced (or rather forces itself) to argue a whole series of Suspension Clause propositions -- thereby demonstrating that those propositions are quite contestable and, accordingly, that "grave and doubtful" constitutional questions *do* exist. We count ten arguments and take them roughly in the order in which the state presents them in its brief.

1. The state contends that this Court decided in *Felker v. Turpin*, 116 S.Ct. 2333, that §§2244(b)(1) and (2) can foreclose Mr. Martinez-Villareal's claim without violating the Suspension Clause. Brief of the Petitioners at 19-20. That is scarcely true. *Felker* decided only the narrow question whether a different provision of the new Act, §2244(b)(3), eliminates this Court's authority to issue the writ of habeas corpus as an original manner. The Court mentioned the Act's "new restrictions on successive petitions" and said that they do not suspend the writ. But that dictum hardly

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[8] (...continued)
Right or Legislative Grace?," 40 Calif.L.Rev. 335 (1952).

helps the state here. This is not a successive petition case. Even if it were, *Felker* approved (at the very most) "new restrictions" on successive petitions only insofar as they constitute a "modified" version of the "abuse of the writ" doctrine -- the very understanding of §§2244(b)(1) and (2) that the state rejects. Brief of the Petitioners at 11 (insisting that these new provisions replace "the whole amorphous concept of other abuse of the writ").

2. The state argues that the Suspension Clause guarantees only the writ of habeas corpus as it existed in 1789. Brief of the Petitioners at 21-22. However, even the state concedes that this point is "still open." *Id.* at 21. The best the state can do is to speculate that "when the question is squarely put, it will be only the 1789 form of the writ which will be found protected." *Id.* at 21-22. This, despite this Court's recent statement in *Felker* that, for purposes of that decision, it would assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Felker*, 116 S.Ct. at 2340. The state thus appears to forget that it is supposed to be showing that there *are* no "open" Suspension Clause questions to be concerned about in this case.

3. The state contends that *if* the writ enshrined in the Suspension Clause is the writ that existed in 1789, that conclusion somehow "means" that the scope of the writ is "quite narrow" and that Congress is thus free (if it wishes) to exclude Mr. Martinez-Villareal's claim entirely. Brief of the Petitioners at 23. The state admits that the Suspension Clause itself fails to provide a "definition" for its "critical terms" but then declares that it "must be *assumed*" that "the Framers" meant "some commonly recognized fund of meaning." *Id.* at 23 (emphasis added). Next, of course, the state purports to know what that meaning was. Here again, the state apparently mistakes the burden it must carry. The state

is not free to *assume* anything, to speculate, or even to advance a persuasive argument regarding a contestable issue. It can claim that the circuit court acted improperly by invoking the avoidance doctrine only if it establishes that there are no issues to contest. That must be done on the basis of solid proof, not negative inferences from the *absence* of proof.

4. The state contends that the Suspension Clause incorporated the writ as it was at common law and that, at common law, the writ was available only to challenge executive detention before trial. Accordingly, the state argues, the Suspension Clause has no bearing on a district court's jurisdiction to entertain Mr. Martinez-Villareal's *Ford* claim. *Id.* at 24-25. The state's argument on this point (and it *is* only an argument) fails for any of four reasons: first, it fails to recognize that Mr. Martinez-Villareal's *Ford* claim is not a collateral attack on his conviction or sentence at all; second, it is inconsistent with precedent; third, it misapprehends the scope of the common law writ; and, fourth, it disregards the development of the federal writ since 1787.

a. *The Ford Claim.* As Mr. Martinez-Villareal explains in his brief, the habeas petition now under consideration challenges the state's proposed administration of his death sentence, not the conviction on which that sentence was based or, indeed, the original imposition of that sentence. Accordingly, the state's extensive argument about habeas as a vehicle for collaterally challenging criminal convictions misses the point entirely.

b. *Precedent.* In any event, this Court squarely rejected the state's argument more than thirty years ago in *Fay v. Noia*, 372 U.S. 391, 403 (1963): "[I]t is not true that at common law habeas corpus was exclusively designed as a remedy for executive detentions; it was early used by the great common-law courts to effect the release of persons detained by order of inferior courts."[9]

If, as the state contends, the Suspension Clause has no bearing on cases in which sentenced prisoners seek habeas relief, the Court's opinion in *United States v. Hayman*, 342 U.S. 205 (1952), makes no sense. In that case, the Court explained that Congress could reroute federal prisoners to the motion remedy established by 28 U.S.C. §2255 without implicating the Suspension Clause -- but only because a §2255 motion is the functional equivalent of the postconviction remedy that habeas corpus previously supplied.

c. *The Common Law Writ.* At common law, the writ of habeas corpus *cum causa* was exempt from ordinary *res judicata* principles.[10] Thus, the writ to which the Suspension Clause refers plainly extended to prisoners who had previously been before another court and had been denied their freedom. As the Court explained in *Noia*, the great English precedent, *Bushell's Case*, 124 Eng. Rep. 1006 (1607), stands for the proposition that the Court of Oyer and Terminer could entertain a habeas petition filed by petitioners who had been placed in jail by order of another court. *Noia*, 372 U.S. at 404.

d. *Developments Since 1787.* No one suggests that the common law writ known to the founding generation had the full scope of the federal writ today. But neither did that writ have a fixed purview that the Suspension Clause simply captured and cast in constitutional stone. The writ of habeas

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[9] *See also McNally v. Hill*, 293 U.S. 131, 135 (1934)(explaining that the Suspension Clause "implicitly recognize[s]" the "use of the writ" by a sentenced prisoner). The Court has abandoned *Noia's* formulation for handling procedural default in state court, but has never authoritatively disclaimed *Noia*'s assessment of this point regarding the traditional character of habeas corpus.

[10] *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968).

corpus had always been a protean judicial instrument, changing with the needs of individuals for the protection of personal liberty. The Suspension Clause thus constitutionalized a dynamic remedy that would adapt itself to the future. Professor Freund made the basic point in his famous brief for the prisoner in *Hayman*: "We shall have to look to history for the essentials of the Great Writ, but not to one point in that history . . . ."[11]

If the writ was not routinely invoked by sentenced prisoners during the earliest years, there was an obvious reason. It was not until the 1830s that incarceration became a common means of sanctioning criminal offenders in this country.[12] Prior to that time, a criminal conviction and sentence initiated custody that might be challenged via habeas corpus; instead, it typically terminated pre-trial detention, rendering habeas corpus no longer necessary. Accordingly, it was not until well into the nineteenth century that there was any occasion for sentenced prisoners to file habeas corpus petitions and, consequently, any occasion to emphasize the writ's availability for that function.[13]

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[11] *United States v. Hayman*, Brief for the Respondent at 33.

[12] David J. Rothman, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 57-109 (1971); *see* J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 416-24 (2d ed. 1979); George Fisher, "The Birth of the Prison Retold," 104 Yale L.J. 1235, 1239 (1995).

[13] Marc M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," 70 Tulane L.Rev. 1, 10-11 & n.40 (1995). One of the state's *amici* attempts to trivialize this line of argument. Brief *Amicus Curiae* of the Criminal Justice Legal Foundation at 10-12. One need not embrace the idea of the "living Constitution" (and whatever implications are thought to flow from it) to acknowledge that the state is simply and irretrievably on contestable ground when it insists that the Suspension Clause has a fixed historical meaning that every disinterested observer will accept.

5. The state argues that the common law writ of 1789 had previously been "regularized" by the English Habeas Corpus Act of 1679. Brief of the Petitioners at 7. In this way, too, the state hopes to show that the writ was (and remains) limited to prisoners attacking executive detention without judicial approval. *Id.* at 23-25. Here again, the state offers no more than speculation, thereby highlighting the very uncertainties it hopes to dispel.

Some observers read the 1679 Act to have denied habeas to convicted prisoners and thus, in some fashion or other, to have curtailed the previous scope of the writ. But Professor Freund refuted that assessment of the 1679 Act. In fact, the 1679 Act was exclusively concerned with ensuring that prisoners under criminal charges were either brought to trial or admitted to bail. It did not cover convicted prisoners for the obvious reason that they had already been tried and thus needed no vehicle for expediting the prosecution. The 1679 Act left convicted prisoners to the common law writ, which allowed them to attack their custody after conviction and sentence.[14] The state is free to disagree, but it can scarcely propose that Professor Freund was so obviously wrong that his argument raises no serious question.

6. The state contends that the Suspension Clause merely restricts Congress' ability to curtail the writ of habeas corpus, but leaves it to Congress to decide in the first instance whether the federal courts have jurisdiction to issue the writ. Brief of the Petitioners at 29. This is circular, of course, but for present purposes it is enough that it is contestable.

By most accounts, the Suspension Clause enjoined the new Congress not to interfere with the *state* courts' authority to issue the writ of habeas corpus, except in case of grave

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[14] *United States v. Hayman*, Brief for the Respondent at 31-32.

emergency. The state insists, however, that the Suspension Clause was indifferent to the possibility that Congress might deny the same authority to any *federal* courts that Congress created. That is far from clear.

To be sure, the Suspension Clause did not obligate Congress to establish federal tribunals. But once Congress created such courts, the Suspension Clause can plausibly be read as obligating Congress to recognize their jurisdiction to issue the writ of habeas corpus. Read in this fashion, the jurisdiction of any Article III court to issue the writ stands on the same footing as this Court's power to adjudicate the cases that Article III places within this Court's original jurisdiction. In both instances, it is the Constitution itself that specifies the judicial power to be exercised.[15] Indeed, this Court has virtually said as much: "In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them." *Ex parte Yerger*, 75 U.S. 85, 95-96 (1869).

Of course, in order for the writ of habeas corpus to be available from an inferior federal court, Congress had to

[15] This Court's original jurisdiction is self-executing. *Arizona v. California*, 373 U.S. 546, 564 (1963). The Court has avoided conflicts with Congress on this point by construing statutes in a way that makes it unnecessary to examine the "doubtful" claim that Congress can withhold any part of that jurisdiction by legislative act. *E.g., California v. Arizona*, 440 U.S. 59, 65 (1979); *accord South Carolina v. Regan*, 465 U.S. 367, 395 (1984)(O'Connor, J., concurring)(reading a statute not to bar original jurisdiction because the alternative construction would raise the "grave" question whether Congress can "impose remedial limitations so jurisdictional in nature that they effectively withdraw the original jurisdiction of this Court"). It is perfectly sensible to argue that the jurisdiction of all Article III courts to issue the writ of habeas corpus is of the same nature and carries the same implications.

"ordain and establish" that court as an Article III tribunal. It is equally true that before this Court could exercise the original jurisdiction provided for in Article III, Congress had to create this body. The point of the Suspension Clause is that jurisdiction to issue the writ of habeas corpus is as much a feature of any Article III court once created as are the tenure and salary protections owed to its judges or justices. A tribunal's character as an Article III court entails certain definitional attributes, which include the power to issue this special, constitutionally grounded remedy for securing liberty of the person.[16]

If this is what the Suspension Clause means, it is not the only extra-Article III provision of the Constitution that defines and shapes the purview of federal judicial power. Article I empowers the Chief Justice to preside in the Senate when the President is tried for impeachment. And, in most circumstances, this Court has held that the Eleventh Amendment deprives the federal courts of power to entertain suits against unconsenting states. *Seminole Tribe v. Florida*, 116 S.Ct. at 1127-28.

The state's simplistic deductions from silence do not dispel counter arguments, but actually invite them. It is quite sensible to read the Suspension Clause to contribute an

[16] The state evidently relies in this connection on the syllogism that "the greater power must necessarily include the lesser." Brief of the Petitioners at 34. That "beguiling" argument works no better here than anywhere else in the law of federal courts. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474 (1957)(Frankfurter, J., dissenting). Congress' power to decide in the first instance whether to create inferior federal courts is not, of course, a "greater" power, which somehow subsumes within it the "lesser" power to manipulate as it pleases the jurisdiction of any courts it chooses to establish. The two powers are different, and the one does not follow logically from the other. Whether any particular jurisdictional enactment comports with Article III is itself an Article III question.

additional constituent element of Article III judicial power, which exists and operates independently of the jurisdictional legislation that Congress enacts. By this different account, the Suspension Clause constitutionalizes habeas corpus in the way that the Eleventh Amendment constituticnalizes state sovereign immunity. Both the Suspension Clause and the Eleventh Amendment draw upon preexisting common law concepts and build them into the federal constitutional structure. Then, once habeas corpus and state sovereign immunity obtain constitutional status, this Court assumes the duty and responsibility for elaborating their meaning as positive constitutional law.

7. The state insists that *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), held that federal habeas jurisdiction is entirely a matter of statute. The claim is unpersuasive. The Suspension Clause must have *something* to say about federal court jurisdiction. Otherwise, Congress might absolutely deprive the Article III judiciary of any power at all to issue the writ.[17]

The Court suggested nothing of the kind in *Bollman*. Indeed, *Bollman* said precisely the opposite: "Congress must have felt, with peculiar force, the *obligation* of providing efficient means by which this great constitutional privilege should receive life and security; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." 8 U.S. at 95 (emphasis added).

In that case, the Court construed the Judiciary Act of 1789 to authorize jurisdiction of the petition as an original matter and thus had no occasion even to mention the Suspension Clause. The Court did state (unremarkably) in *Bollman* that "the power to award the writ by any of the courts of the United States must be given by written law." 8 U.S. at 94. But that "written law" could obviously be supplied by the written Constitution, as well as by a statute. The Court was perfectly clear on this point when it disclaimed any general "common law" jurisdiction "not given" *either* "by the constitution *or* by the laws of the United States," *id.* at 93 (emphasis added), and explained that the inquiry was whether "by any statute, *compatible with the constitution* . . ., the power to award a writ of *habeas corpus*, . . . ha[d] been given." *Id.* (emphasis added).

As the state points out, this Court said that its authority to issue the writ in *Bollman* was a species of appellate, rather than original, jurisdiction -- even though the petition had been filed here initially. The state apparently draws from that observation the conclusion that the Suspension Clause supplied no basis for original jurisdiction. At that point in its *Bollman* opinion, however, the Court only meant to distinguish *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Court had previously said that Congress could not give this Court jurisdiction to issue the writ of *mandamus* as an original matter.

The Court did not squarely address the implications of the Suspension Clause in either *Bollman* or *Marbury*. There is no basis, accordingly, for imputing to the Court in those cases a conscious, authoritative decision that it had no original habeas jurisdiction pursuant to that Clause. By contrast, there is a far more likely explanation for the way in which *Bollman* deflected *Marbury*. The Court may have overlooked the constitutional basis for its original habeas jurisdiction when it decided, in *Marbury*, that it could not exercise original jurisdiction beyond the cases expressly mentioned in Article III. Then, in *Bollman*, the Court may simply have seized counsel's invitation to treat its habeas jurisdiction as appellate as a convenient means of acknowledging

[17] The state concedes that the Suspension Clause imposes some obligations on Congress. Brief of the Petitioners at 21-22.

its original habeas jurisdiction (in effect if not in form) without conceding any lapse in *Marbury*.[18]

The ultimate decision in *Bollman* did not turn on the way the Court distinguished *Marbury* or, for that matter, on whether *Marbury* was distinguishable at all. The Court examined the petition in *Bollman* on the merits. That hard judicial action may be explained just as easily, indeed much more easily, as an exercise of original habeas jurisdiction derived from the Suspension Clause. In any event, the point here is that *Bollman* raised far more questions that it answered. By asking the Court to revisit that controversial old case, the state once again demonstrates that there *are* outstanding Suspension Clause issues yet to be decided.

8. The state contends that the development of modern habeas corpus has no bearing on the scope of the Suspension Clause and, indeed, fortifies the state's claim that the availability of habeas relief is determined solely by statute. Brief of the Petitioners at 35-40. Again, this only evokes counter arguments that defeat the state's purpose to show that no such arguments exist.

This Court has repeatedly shaped the scope of the writ to better serve its role as an effective safeguard for liberty of the person, even while "the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). Plainly, the Court developed the writ of habeas corpus to keep pace with the development of individual rights that required the kind of enforcement mechanism the writ could supply. Prior to the Fourteenth Amendment, the Court shaped the writ to vindicate the rights of prisoners convicted in federal court. Thereafter, the Court retooled the writ into a vehicle for enforcing the

[18] Francis Paschal, "The Constitution and Habeas Corpus," 1970 Duke L.J. 605, 650-51.

new federal rights of prisoners convicted in state court. That effort accelerated after the Court read the Fourteenth Amendment to "incorporate" procedural safeguards for the conduct of state criminal trials.

There is an explanation for the link between the writ and the body of rights that may be violated when citizens are denied liberty of the person -- and equally for this Court's interpretive authority to tailor the one to effectuate the other. The writ of habeas corpus and the rights asserted in habeas petitions share a common constitutional anchorage. The Suspension Clause supplies the constitutional basis for issuing the writ -- both by this Court and by the lower courts. The statutes in point are not irrelevant. But the creative enterprise has been to reconcile statutory directives with judicially crafted doctrines, developed independently. There is a constitutional core to federal habeas corpus. Otherwise, this Court's precedents over nearly two hundred years are unintelligible.

The Court's procedural decisions make the same point. No one would contend that decisions like *Rose v. Lundy*,[19] *McCleskey v. Zant*,[20] *Schlup v. Delo*,[21] and *Teague v. Lane*[22] were merely constructions of the statutes that hovered in the background. Those cases, too, can best be explained if federal habeas corpus has a separate, constitutional basis in the Suspension Clause.

[19] 455 U.S. 509 (1982)(holding that "mixed" petitions should be dismissed in their entirety).

[20] 499 U.S. 467 (1991)(applying the standards developed for procedural default cases to successive petition cases).

[21] 115 S.Ct. 851 (1995)(developing standards for successive petitions attacking the validity of convictions).

[22] 489 U.S. 288 (1989)(holding that new rules of constitutional law are usually inapplicable in federal habeas).

This is the very explanation the Court offered in *Felker*. Statutes that merely orchestrate the federal courts' exercise of jurisdiction to ensure efficiency do not raise Suspension Clause problems if they promote policies that are entirely consistent with the writ's constitutional status and functions. *Felker*, 116 S.Ct. at 2340.[23] A serious Suspension Clause issue would be presented, however, if a statute were read to foreclose a claim advanced by a prisoner who has done everything he can to comply with efficiency-producing rules.

9. The state contends that the Suspension Clause is irrelevant to this case because Mr. Martinez-Villareal is in state, not federal, custody. Brief of the Petitioners at 30. This argument not only proceeds from the contestable premise that the federal courts' jurisdiction to issue the writ is wholly a creature of statute. It entirely neglects the significance of the Fourteenth Amendment for state prisoners' ability to invoke federal judicial power to safeguard liberty of the person.

It is certainly arguable that the Suspension Clause guaranteed from the very outset that habeas corpus would be available to prisoners in state custody. At that time, the national government obviously did not yet exist and thus had no prisoners who might seek their release. The Suspension Clause must have targeted state prisoners, accordingly, and barred the new government from denying their access to the writ, both in state court and in any national courts that would soon be established.[24]

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[23] *See Schlup v. Delo*, 115 S.Ct. at 875 (Scalia, J., dissenting)(referring to Congress' ability to curtail federal habeas corpus for state prisoners only "within the broad limits of the Suspension Clause).

[24] One of the state's *amici* cites *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845), for a square holding that in the absence of statutory authority, (continued...)

It is hardly surprising that state prisoners actually began to file petitions for federal habeas relief only in the nineteenth century. Prior to that, state prisoners had very few federal rights they might have tried to enforce in federal court.[25] The state asserts that state prisoners could file federal petitions only after the Habeas Corpus Act of 1867 -- as though it were that Act alone that somehow entitled them to seek relief from the federal courts. In truth, it was not the habeas corpus jurisdictional statute that Congress enacted in 1867, but the Fourteenth Amendment that Congress proposed in that same year, which made it possible for state prisoners to seek federal relief via habeas corpus -- by providing them with federal rights that could be asserted to challenge their detention.[26]

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[24] (...continued)
this Court has no jurisdiction to entertain a habeas application from a prisoner in state custody. Brief *Amicus Curiae* of the Criminal Justice Legal Foundation at 11. In *Dorr*, however, the Court did not mention the Suspension Clause and thus scarcely resolved the constitutional issue. Moreover, *Dorr* would be decided differently today. In that case, the state of Rhode Island refused to allow counsel to visit the prisoner in order to obtain his approval to petition this Court for a writ of error. Counsel then sought a writ of habeas corpus as a means of reaching his client. The Court concluded that it had no statutory jurisdiction to entertain that petition, that counsel could not seek a writ of error without his client's consent and that, accordingly, the prisoner's claim could not be heard at all. That, of course, would not be the result now. *See Ex parte Hull*, 312 U.S. 546, 547-49 (1941)(holding that state officials cannot interfere with a prisoner's access to the federal courts).

[25] Paschal, *supra* at 646-47.

[26] Alternatively, it is arguable that the Fourteenth Amendment extended federal habeas corpus to state prisoners. In *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court adopted a narrow interpretation of the "privileges or immunities" clause. Then, to clarify its decision, the Court offered several illustrations of previously existing rights that now (continued...)

10. Finally, the state argues that if the Constitution guarantees a federal forum for Mr. Martinez-Villareal's claim, that forum is provided by this Court on *certiorari* review of the state court's judgment. Once more, the state has lost sight of its mission. Under the avoidance doctrine, it must demonstrate that there are no serious Suspension Clause issues in this case. Instead, it offers yet another contestable assertion that only underscores *how many* constitutional questions would be implicated if the habeas statutes were construed in the way the state suggests.

In this instance, the state confuses the particular case it is supposed to be building with the different set of questions addressed in most of the academic literature about the federal courts: whether Article III guarantees a federal forum for every federal claim, whether one federal forum may be closed as long as another is open, and whether due process will permit all access to the federal courts to be cut off, provided the state courts remain available. The particular question here, however, is whether the Suspension Clause designates *a particular class* of federal-question cases for special treatment, regardless of what Article III and due process may portend for other kinds of federal-question litigation.

The state not only broaches the wrong question, but gives the wrong answer. If *certiorari* were sufficient, the Suspension Clause would have no independent meaning. It would add nothing to what Article III and due process already entail. By this different account, the Suspension Clause adds to the cases and controversies listed in Article III a single, but extraordinarily important, species of federal jurisdiction (cases in which liberty of the person is at stake), which (like this Court's original jurisdiction) is self-executing and cannot be negated by statute.

It is no answer that Mr. Martinez-Villareal may contend for his physical liberty in state court and then can seek appellate review here.[27] Those alternative adjudicatory mechanisms may satisfy the demands of Article III and due process. But they do not satisfy the Suspension Clause, if that Clause is understood to establish an independent requirement that a prisoner who advances a challenge to his physical custody is entitled to contend for his liberty in a federal district court.

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[26] (...continued)
would be available to citizens to protect them from state power. Among those was "the privilege of the writ of habeas corpus." *Id.* at 79. The Court thus acknowledged: (1) that the Constitution already guaranteed some privileges and immunities to citizens of the United States; (2) that the privilege of the writ of habeas corpus was one of them; (3) that those privileges and immunities protected citizens contesting federal governmental power; and (4) that the Fourteenth Amendment extended their operation to citizens attacking state power. In sum, the "privileges or immunities" clause extended the privilege of federal habeas corpus, previously available only to prisoners challenging detention in federal custody, to prisoners challenging custody in the hands of state authorities. Professor Crosskey took a different view. 2 W.W. Crosskey, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1130 (1953). But that only demonstrates that the matter is debatable -- which again defeats the state's attempt to show that no Suspension Clause questions lie in the background of this case.

[27] Of course, this Court does not exercise an ordinary appellate jurisdiction to correct errors below. It would compromise the Court's role as ultimate referee to expect anything of the kind.

III. THIS COURT'S POWER TO ENTERTAIN A HABEAS CORPUS PETITION AS AN ORIGINAL MATTER DOES NOT DEFUSE THE SUSPENSION CLAUSE QUESTION

The circuit court below erroneously assumed that Suspension Clause questions would be presented in this case only if §§2244(b)(1) & (2) were read to bar both the district court and this Court from entertaining Mr. Martinez-Villareal's habeas corpus petition. The state seizes upon that assumption. Properly read, however, the Act does not affect this Court's jurisdiction. Moreover, the formal possibility of an original habeas corpus petition filed initially in this Court does not defuse potential Suspension Clause problems.

In *Felker v. Turpin*, 116 S.Ct. 2333, this Court held that the "gatekeeping" provision in the new Act, §2244(b)(3), does not foreclose a habeas corpus petition filed here as an original matter. The Court had no occasion in *Felker* to say how or whether §§2244(b)(1) & (2) might affect such an original habeas petition. The Court said only that it would be "informed" by those subsections "whether or not" the Court is actually "bound" by them. 116 S.Ct. at 2339.

Nevertheless, the circuit court below concluded that §§22441(b)(1) & (2) *are* applicable to a habeas petition filed originally in this Court. The circuit court reasoned that *Felker* found §2244(b)(3) to be inapplicable to an original petition in part because that section explicitly states that it governs petitions filed "in the district court." *Felker*, 116 S.Ct. at 2339. That, according to the circuit court, established a "signpost" indicating that §§2244(b)(1) & (2) *do* apply to an original petition in this Court, because those provisions contain no explicit statement that they, too, govern only petitions at the district court level. *Martinez-Villareal*, 118 F.3d at 632.

To reason that way is to neglect *Felker's* principal reason for reading §2244(b)(3) not to affect an original petition filed here: the absence of *affirmative* language stating as much. The circuit court below erroneously equated legislative silence with an affirmative legislative attempt to withdraw jurisdiction from this Court. By contrast, this Court stated explicitly in *Felker* that it would not read a withdrawal of jurisdiction into a statute by negative implication. *Felker*, 116 S.Ct. at 2339.

The circuit court also misread *Felker's* statement that this Court would be "informed" by the other subsections in §2244(b). The point of that statement was not to *make* any decision on the impact that §§2244(b)(1) & (2) might ultimately have on original actions, but rather to *decline* any such decision. This Court obviously takes account of any policies that Congress sponsors, in this or any field. To acknowledge that the Court is "informed" by those policies is not to render a judicial decision that a particular statute has made, or has attempted to make, a policy binding on this or any Article III court.

In particular, the Court's statement in *Felker* cannot be read to have anticipated the application of §2244(b)(1) to a case like this one. In the very next section of its opinion, the Court explained that it would be "informed" by §2244(b)'s substantive restrictions inasmuch as they embody conventional rules for discouraging an "abuse of the writ." *Id.* at 2340. A petition is "abusive" when it advances a new claim that might have been raised in a prior petition. *Schlup v. Delo*, 115 S.Ct. at 863 n.34 (1995). The circuit court explained that some prisoners might attempt to avoid §2244(b)(1) by withholding a *Ford* claim from an initial petition and raising it later in a second application. In this case, however, Mr. Martinez-Villareal made no attempt to litigate his claims piecemeal. He did not withhold his *Ford* claim from his first petition, but expressly advanced it --

only to see it postponed at the state's request.

This Court has power to entertain an original petition from Mr. Martinez-Villareal in this case for the same reason it had power to entertain such a petition in *Felker*. Congress has made no attempt to withdraw this Court's jurisdiction to do so: not in §2244(b)(3), nor in §§2244(b)(1) & (2).

In *Felker*, the preservation of this Court's jurisdiction to entertain an original habeas petition "obviate[d]" the question whether §2244(b)(3) constitutes an invalid deprivation of this Court's appellate jurisdiction in violation of Article III, §2, cl.2. *Felker*, 116 S.Ct. at 2339. *See* Brief *Amicus Curiae* of the American Civil Liberties Union, *Felker v. Turpin*.[28] The circuit court in this case suggested that the preservation of that same kind of jurisdiction would obviate the Suspension Clause issues here. *Martinez-Villareal*, 118 F.3d at 631. That does not follow.

The Court acknowledged in *Felker* that §2244(b)(3) removes this Court's jurisdiction to review a circuit panel's exercise of the "gatekeeping" function by appeal or *certiorari*. 116 S.Ct. at 2338-39. The elimination of those conventional vehicles for appellate review does not violate Article III, §2, c.2, because the Court can superintend the circuit courts in substantially the same way via its power to entertain original petitions from the same prisoners. The shift from *certiorari* to original habeas may entail some adjustments in this Court's practice, but not enough to conclude that Congress has interfered with the Court's central

[28] In *Felker*, the Court proceeded on the premise that its jurisdiction to entertain habeas corpus petitions as an original matter is a species of appellate jurisdiction. That premise is contestable. If the state has his way, the Court will have to revisit the old *Bollman* case and engage this question, too.

clude that Congress has interfered with the Court's central function as the judicial system's ultimate referee.

Here, by contrast, the preservation of this Court's power to entertain Mr. Martinez-Villareal's *Ford* claim in an original habeas action could not make up for the loss of the district court's authority to do so. That would not constitute a modest adjustment in the formal means by which this Court exercises appellate review of a circuit panel to ensure that it processes cases in conformity with applicable procedural rules. It would be a blanket suspension of a district court's ability to determine the *merits* of a claim regarding *liberty of the person*. The state's interpretation of the statutes in this case would thus raise Suspension Clause questions that the statute in *Felker* did not -- questions this Court scarcely resolved when it concluded that the statute in *Felker* did not interfere with the Court's ordinary appellate jurisdiction under Article III, §2, cl.2.

No one would propose that this Court can implement the principle in *Ford* by itself providing the kind of merits adjudication that typically occurs at the district court level. To allow that theoretical possibility to satisfy the Suspension Clause would be to elevate form over substance. An explicit constitutional provision is not an idea that commands respect only in the breach. It is positive law governing governmental institutions and, in this instance, protecting individual rights. Whatever the Suspension Clause means, it must mean something that counts in the real world for real people.

If the mere theoretical existence of this Court's original jurisdiction were enough to satisfy the Suspension Clause in this case, it would presumably be enough in a variety of cases or, indeed, in all cases. That cannot be the law. In the modern era, this Court's function is genuinely appellate in

nature.[29] Whatever this Court does it must do in reaction to what a lower court has done; whatever it cannot do in that way, it cannot hope to do at all.

This is why the Court in *Felker* did not dismiss concerns touching the Suspension Clause in the way it set aside Article III considerations in that case. Channeling review in "gatekeeping" cases into original habeas does not substantially reduce this Court's actual ability to perform its oversight function in that very limited context. Accordingly, §2244(b)(3) does not place the Court's Article III duties at risk. Channeling the merits of *Ford* claims (and potentially a host of other claims as well) into original jurisdiction would have devastating implications for liberty of the person in the United States and thus *would* present serious questions under the Suspension Clause.

[29] *See generally Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed. The circuit court correctly construed the relevant statutes and correctly recognized the serious constitutional issues that would be raised by the state's contrary interpretation.

Respectfully submitted,

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Dated: December 22, 1997

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

(10)

No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Questions Presented

1. Whether Congress intended the AEDPA's limitations on second or successive habeas corpus petitions to apply to all claims and in every court, including competency for execution claims and applications for "original" Supreme Court habeas corpus writs.

2. Whether applying the AEDPA to prevent consideration of a claim of incompetency for execution, raised in a second or successive habeas corpus petition, constitutes a violation of the Suspension Clause.

3. Whether this Court has jurisdiction to entertain the State's petition for review in light of the express prohibition against certiorari under 28 U.S.C. §2244(b)(3)(E) and the absence of extraordinary circumstances warranting relief under the All Writs Act (28 U.S.C. §1651(a)).

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime ... [f]oster the integrity, independence and expertise of the criminal defense profession ... and[p]romote the proper and fair administration of justice." NACDL has more than 9,000 members nationwide -- along with 78 state and local affiliate organizations numbering 25,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*. *See, e.g., Trest v. Cain*, 66 U.S.L.W. 4023 (1997).[1]

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1 Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

Statement of the Case

This case raises important questions relating to the power of the federal courts to entertain constitutional claims concerning the mental competence of death-sentenced state prisoners facing impending execution (*Ford v. Wainwright*, 477 U.S. 399 (1986)) where such claims, although timely asserted, may not properly be adjudicated in the prisoner's initial habeas petition (on grounds of prematurity) and would now appear to be explicitly precluded from consideration on a second or successive habeas petition under the terms of the newly-codified 28 U.S.C. §2244(b)(1) & (2) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, effective April 24, 1996.

Subsection (b)(1) of the new statute states categorically that any claim presented in a prior habeas application "shall be dismissed", irrespective of whether that claim received merits adjudication in the district court.[2] Subsection (b)(2) provides that new claims presented in a second application must be dismissed unless the prisoner demonstrates that his claim is based on a new rule of constitutional law, made retroactive by the Supreme Court, that was previously unavailable (subsection (b)(2)(A)) or that his claim is based on a colorable factual demonstration of innocence (subsection (b)(2)(B)). Accordingly, as the court of appeals noted, the new statute thus effectively whipsaws a habeas petitioner by precluding a federal court from entertaining a colorably meritorious execution-competence claim on either a first *or* a second federal petition. 118 F.3d at 630-31.

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2 As noted by the court of appeals, "[t]his sanction applies to a competency claim raised in a first petition even though that claim can never be adjudicated because it will always be premature." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 630-31 (9th Cir. 1997).

Further complicating matters is the unintended retroactive impact of the AEDPA, enacted on April 24, 1996, on the adjudication of respondent's execution-competence claim. This Court determined last Term that the AEDPA's revisions to Chapter 153 of Title 28 of the United States Code apply only to habeas petitions filed on or after its effective date. *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997). However, the new statute's implications for cases like the one at bar, whose litigation effectively straddles the enactment of the new statute, is indeed problematic.

In this case, respondent filed his initial federal petition in March 1993 and the district court granted partial habeas relief, on unrelated grounds, in October 1994. *Martinez-Villareal v. Stewart*, 80 F.3d 1301, 1305 (9th Cir. 1996). Nevertheless, the district court found respondent's execution-competence claim to be premature and dismissed it without prejudice. *Id.* at 1307; 118 F.3d at 630 & n.1.[3] On appeal, the court of appeals reversed the district court's grant of partial habeas relief. 80 F.3d at 1307-09. It did so, however, with the express proviso that its "instruction to enter judgment denying the petition is not intended to affect any later litigation of [the execution-competence] question." 80 F.3d at 1309 n.1; 118 F.3d at 630.

Intervening events, however, unexpectedly changed the fundamental legal complexion of the case. The court of appeals' decision reversing the grant of relief -- except on the execution-competence claim -- was entered on April 4, 1996. Three weeks later, on April 24, 1996, the AEDPA was

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3 Indeed, the court of appeals found it ironic that it was the State that had urged the district court to find respondent's execution-competence claim not yet ripe for adjudication, suggesting that it await the resolution of his other legal claims and the issuance of an execution warrant. 118 F.3d at 630 n.1.

subsequently signed into law. The new Act's wholesale statutory revision of habeas corpus remodeled the landscape by which second and successive petitions were henceforth to be treated by the federal courts. *Compare* amended-§2244(b)(1) & (2)(mandatory dismissal for same-claim petitions with narrow exceptions only for new claims) *with McCleskey v. Zant*, 499 U.S. 467, 489 (1991)(permissive dismissal based upon "the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions"); *Felker v. Turpin*, 116 S.Ct. 2333, 2340 (1996).

Accordingly, in May 1997, when respondent sought to amend the district court's judgment and renew his execution-competence claim -- the same claim that was earlier dismissed without prejudice -- his motion was now denied as a result of the new successive writ provisions of the AEDPA. *Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997). The court of appeals, however, granted limited procedural relief. *Id.* at 629, 632-33. Holding that AEDPA's prohibition on successive petitions did not apply to a petition that raised only an execution-competence claim -- a claim that was timely asserted in respondent's original petition but dismissed without prejudice as premature -- the court of appeals transferred the petition to the district court, pursuant to 28 U.S.C. §2241(b), for plenary merits adjudication. *Id.* at 633-34.

Before this Court, and upon dubious jurisdictional grounds -- *see* Point III, *infra* -- the State seeks to overturn the court of appeals' carefully-crafted statutory analysis, in which it relied on the venerable rule that courts should construe statutes so as to avoid constitutional questions, by suggesting that this Court engage instead in a thorough-going re-examination of the Suspension Clause (U.S. Const., art. I, §9, cl. 2) and its implication for the wholesale vitality of the

statutory changes wrought in habeas jurisprudence by the AEDPA. (Pet. Br. Point II). The State's contentions in this regard are thoroughly addressed (and refuted) in the *amicus curiae* brief filed herein by the American Civil Liberties Union on behalf of respondent and will not be repeated here.

This brief addresses several additional issues that the State has given unnecessarily short shrift but which come closer to the core of the actual legal controversy presently before the Court. First, the new amendments to §2244 foreclose any adjudication of respondent's *Ford* claim even though it would have received merits review under prior law -- as explicitly intended by the very federal judges who had earlier entertained respondent's claims. That being the case, the new AEDPA has effectively worked an arbitrary (and retrospective) change in the law in violation of the due process clause. This statute dramatically changed prior law -- as well as upsetting the settled expectations of the very federal judges who had earlier entertained respondent's claims and anticipated their later renewal on the merits. Indeed, the unfairness of this unexpected change of law was underscored by this Court's subsequent determination that AEDPA's provisions were to be applied only prospectively. *Lindh v. Murphy*, 117 S.Ct. at 2063.

Second, respondent's *Ford* claim is no "successive" claim by any plausible construction of the controlling statutes, including §2244(b)(1) & (2). Indeed, this second application is respondent's first meaningful opportunity to put his *Ford* claim before the federal courts for plenary merits review. Whether construed under principles of, e.g., successive petitions (*Sanders v. United States*, 373 U.S. 1, 15-16 (1963); *McCleskey v. Zant, supra*) or exhausting the state remedies of mixed habeas petitions (*Rose v. Lundy*, 455 U.S. 509 (1982)), where there has been no prior judgment on the merits of a

timely-asserted habeas claim, and where the claim was explicitly dismissed without prejudice, a later renewal of the same claim does not constitute a successive petition.

Moreover, where respondent is not attacking his conviction or sentence *per se*, but only the procedures employed in evaluating his mental state pending execution of sentence, he is independently entitled to present his claims to the federal courts under the omnibus federal habeas statute (28 U.S.C. §2241(c)(3)). Under any and all of these jurisdictional (and constitutional) bases, the court of appeals correctly construed the new statute in a way that properly avoided serious constitutional conundra.

SUMMARY OF ARGUMENT

1. This Court has held that the habeas corpus amendments enacted as part of the AEDPA apply prospectively to cases filed after its enactment in April 1996. Respondent's execution-competence claim was raised in his first pre-AEDPA petition but was dismissed without prejudice as premature by both the district court and the court of appeals prior to the new statute's enactment. Enforcement of the successive writ provisions of the new statute would now mandate dismissal of respondent's renewed claim. In light of the "new legal consequences" and reliance interests of the parties -- as well as the federal judges who ruled on the first petition -- dismissal of respondent's execution-competence claim without plenary merits review would constitute the retrospective enforcement of a prospective statute to a case whose litigation straddled the time period in which the legislation was enacted. Constitutional and equitable principles uniquely applicable to habeas corpus fully justified the court of appeals' remand of respondent's *Ford* claim to the district court, notwithstanding amended-§2244, for

plenary merits review.

2. Respondent's *Ford* claim was properly remanded to the district court for merits review. The claim was not successive as there had been no prior adjudication on the merits when it was raised in respondent's first petition. Accordingly, the district court could entertain the renewed claim either under the traditional habeas corpus statute (28 U.S.C. §2241(c)(3))or under Rule 60(b)(6) of the federal civil rules.

3. This Court lacks jurisdiction to entertain the State's petition for review. Certiorari is precluded by statute in this case and the State has failed to make the requisite showing of extraordinary circumstances to warrant relief under the All Writs Act.

ARGUMENT

I

ENFORCEMENT OF AMENDED-§2244'S SAME-CLAIM PRECLUSION RULE AGAINST RESPONDENT'S *FORD* CLAIM WOULD VIOLATE DUE PROCESS BY, IN EFFECT, ENFORCING RETROACTIVELY A STATUTE THIS COURT HAS DETERMINED APPLIES ONLY PROSPECTIVELY

In *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), this Court determined that, absent a clear statement from Congress, a new law should not be applied to penalize past conduct if it would "attach[] new legal consequences to events completed before its enactment." *Id.* at 270. Courts have developed a longstanding presumption against retroactivity reflective of the notion that "[r]etroactive legislation presents

problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors v. Romein*, 503 U.S. 181, 191 (1992).

Landgraf provides a wide range of illustrative ways in which statutory provisions may create (or extinguish) "new legal consequences" by their retrospective application. Among the kinds of statutory provisions that have "retroactive effects" are those that (1) "affect[] substantive rights", 511 U.S. at 278, (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280, or (3) "change the legal consequence of acts completed before [the new law's] effective date" *id.* at 269 n.23.

In the present case, the "new legal consequences" of the statute's enactment amounts to the outright extinction of respondent's right to secure plenary review of his *Ford* claim. Notwithstanding the express reservation of his right asserted in his first petition -- a reservation concurred in by both the district court and the court of appeals -- the new statute expressly precludes respondent from renewing his "same claim" in a later petition, precisely the vice *Landgraf* cautioned against, 511 U.S. at 270 ("retroactivity is a matter on which ... considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance"); *id.* at 282 n.35 ("concerns of unfair surprise and upsetting expectations"); *id.* at 265 n.18 ("deprive citizens of legitimate expectations and upset settled transactions").

As the Court recently reaffirmed in an *ex post facto* case, the constitutional limitations on civil and criminal retroactive legislation are necessary in order to "place[] limits on the sovereign's ability to use its lawmaking power to modify

bargains it has made with its subjects". *Lynce v. Mathis*, 117 S.Ct. 891, 895 (1997).

Part of the analysis of whether retroactive application of a statute is arbitrary and irrational is whether it imposes an oppressive and harsh burden. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938).. In this case, where the "new legal consequences" of the amended statute have extinguished respondent's substantive and procedural rights that were expressly reserved for him by the federal courts, his right to due process has been violated as well. As the writ of habeas corpus has evolved into a mechanism that guarantees application of basic constitutional doctrines of fairness, so its flexibility as an equitable remedy allows courts to shape relief to the circumstances -- and equities -- of each case. *Lonchar v. Thomas*, 116 S.Ct. 1293, 1298 (1996); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

Faced with these equitable -- and constitutional -- considerations, the court of appeals properly balanced the equities in refusing to enforce the harsh and inflexible provisions of §2244 against respondent. In so doing, it interpreted the statute in such a way as to avoid serious constitutional problems in the enforcement of a statute intended to be enforced only prospectively.

II

NOTWITHSTANDING AMENDED-§2244, RESPONDENT'S *FORD* CLAIM MAY BE HEARD BY THE FEDERAL COURTS WHERE IT WAS RAISED IN HIS INITIAL HABEAS PETITION AND WAS NEVER ADJUDICATED ON THE MERITS; ALTERNATIVELY,

RESPONDENT MAY INVOKE §2241(C)(3) WHERE HE IS ATTACKING THE ADMINISTRATION OF HIS SENTENCE, NOT THE JUDGMENT OF CONVICTION OR SENTENCE

Putting aside the constitutional implications of retroactively enforcing amended-§2244 against a prisoner under circumstances in which both the federal district court and the court of appeals explicitly extended him the right to renew his *Ford* claim at such future time as it became ripe for adjudication, it is axiomatic that the court of appeals' solution -- a remand to the district court for plenary merits review -- was eminently correct. 118 F.3d at 632-34.

A. The *Ford* Claim Was Not Successive Where There Had Been No Prior Judgment On The Merits

Section 2244 ordinarily does not apply to second or successive petitions where the first petition was dismissed without prejudice or there was no merits adjudication of the operative claim sought to be litigated anew. *See In Re Turner*, 101 F.3d 1323 (9th Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (2d Cir. 1996)("because application of the gatekeeping provisions [of §2244] to deny a resubmitted petition in cases such as this would effectively preclude any habeas review ... a dismissal without prejudice can have no preclusive effect on subsequent petitions"); *see especially Burris v. Parke*, 95 F.3d 465, 468-69 (7th Cir. 1996)(*en banc*)(habeas petitioner allowed to proceed under pre-AEDPA provisions where litigant had no prior notice of Act's stringent successor provisions).

Turner and *Camarano* are founded on the total-exhaustion principles of *Rose v. Lundy* but the same rationale applies with equal force to respondent's *Ford* claim. Just as

mixed petitions containing unexhausted claims must be dismissed, so, too, execution-competence claims raised in first petitions will always be dismissible as premature. Accordingly, to relegate competence claims to successive petitions under the new statute is to ensure that they will never receive plenary adjudication on the merits in the federal courts. *See, e.g.*, Rule 9(b) of the *Rules Governing §2254 Cases* ("prior determination ... on the merits"); *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990)(*en banc*)("the District Court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition"); *Rose v. Lundy*, 455 U.S. at 537-38 (Brennan, J., concurring and dissenting); *see also* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice And Procedure* §§28.3b at 918-19 & nn.36-38, 28.4d at 935-37 (2d ed. 1994) (and cases collected therein).[4]

Thus, where an execution competence claim has been raised in an initial federal petition, and dismissed as premature, the federal courts must be permitted to entertain the merits of the claim once it achieves "ripeness" without running afoul of the successive petition rule. All habeas litigants remain entitled to "one bite of the apple" of plenary review. Where he cannot receive merits adjudication when his claim is initially presented, through no fault of his own, he is nevertheless entitled to it once it becomes ripe for adjudication. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)(state cannot terminate a

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4 Indeed, as the courtof appeals itself noted (118 F.3d at 634 n.7), the *sui generis* nature of execution-competence claims, and the exceptional procedural posture in which they usually arise, leaves open the question whether they even fit within the conventional rubric of the phrase "second or successive habeas corpus applications", *citing Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995)(*Ford* claims in the context of abuse of the writ or successive petitions); *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994)(accord).

party's claim simply because a hearing was not held within specific time, particularly where he has no means of ensuring deadline is met; party is entitled to an "opportunity to present his case and have its merits fairly judged").

B. The *Ford* Claim May Be Renewed In The District Court Under F.R.C.P. 60 (b)(6) Where Timely Asserted First Petition Claim Is Now Ripe For Adjudication

The court of appeals was well within its authority in remanding respondent's *Ford* claim to the district court for plenary review, particularly where the claim had already been timely asserted in respondent's first habeas petition and it was dismissed without prejudice on prematurity grounds. The district court initially declined to entertain respondent's motion to reopen the first habeas proceeding, believing itself divested of jurisdiction by the AEDPA . 118 F.3d at 630. Under Rule 60(b)(6), however, the district court had the power to reopen the proceedings, notwithstanding AEDPA, and the court of appeals correctly sent the matter back to the district court for plenary merits review.

Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when 'appropriate to accomplish justice'". *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977)(*quoting Klapprott v. United States*, 335 U.S. 601, 615 (1949)(plurality opinion of Black, J.)). It constitutes a "grand reservoir of equitable power to do justice in a particular case". *Radack v. Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963); *Matarese v. LeFevre*. 801 F.2d 98, 106-07 (2d Cir. 1986). It is "properly invoked where there are extraordinary circumstances" (*Ackermann v. United States*, 340 U.S. 193, 199 (1950)) and "should be liberally construed when substantial justice will thus be served".

United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977). The Second Circuit has ratified the use of Rule 60(b)(6) motions in the context of habeas proceedings where, *inter alia*, there has been post-judgment change in the law. *Matarese*, 801 F.2d at 106 (*citing Sanders v. United States*, 373 U.S. at 8).

This Court has determined that "to reopen a judgment ... [pursuant to Rule 60(b)(6)], a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay"; extraordinary circumstances are present when a party was prevented from earlier compliance by "incarceration, ill health, [or] other factors beyond his reasonable control". *Pioneer Inves. Serv. Co. v.. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 394 (1993); *Ritter v. Smith*, 811 F.2d 1398, 1401-03 (11th Cir. 1987); *High v. Zant*, 916 F.2d 1507, 1509-10 (11th Cir. 1990).

Here, of course, the "changed circumstance" was entirely outside respondent's control -- the State of Arizona set a formal execution date which perforce made his execution-competence claim immediately justiciable. Under the changed factual circumstances, then, respondent's *Ford* claim is finally ripe for adjudication and should be reconsidered on the merits by the district court before which it was originally asserted. Rule 60(b)(6) is the appropriate jurisdictional vehicle by which the district court may proceed.

C. The Traditional Habeas Remedy Of §2241(c)(3) Remains Available Where A State Prisoner Attacks The Imposition Of His Sentence, Not The Judgment Of Conviction Or Sentence

This Court has recognized that the range of cognizable claims raised by state prisoners in habeas corpus proceedings is

extremely broad. These claims address not only attacks on judgments of conviction and sentences imposed by state courts, pursuant to §2254, but also collateral attacks by state and federal prisoners alleging that they are being held "in custody in violation of the Constitution or law or treaties of the United States". 28 U.S.C. §2241(c)(3). *McCleskey v. Zant*, 499 U.S. at 477-78. Among these cognizable habeas claims are those attacking the method of execution -- *Gomez v. U.S. Dist. Ct.*, 503 U.S. 653 (1992)(lethal gas); *Poyner v. Murray*, 508 U.S. 931, 932-33 (1993)(Souter, J., opinion respecting denial of certiorari)(electrocution); *Campbell v. Wood*, 511 U.S. 1118, 1119-20 (1994)(Blackmun, J., dissenting from denial of stay and certiorari)(hanging) -- as well as attacks on procedures for fairly assessing the mental state of the condemned to determine his execution-competence. *Ford v. Wainwright, supra. See also Preiser v. Rodriguez*, 411 U.S. 475 (1973)(habeas corpus is a "concurrent federal remedy" along with 42 U.S.C. §1983 in prison conditions cases).

While Congress has amended and fine-tuned the federal courts' power to entertain and issue the writ to state and federal prisoners attacking their convictions under 28 U.S.C. §§2254 & 2255, it has nevertheless left unamended -- and unimpeded -- the general power of the federal courts to grant the writ of habeas corpus under §2241 -- the statute that is the direct descendent of Section 14 of the Judiciary Act of 1789 and the 1867 Act, which greatly expanded the scope of the writ. *Felker v. Turpin*, 116 S.Ct. at 2338-39; *Triestman v. United States*, 124 F.3d 361, 373-80 (2d Cir. 1997)(Calabresi, J.); *In re Dorsainvil*, 119 F.3d 245, 248-49 (3d Cir. 1997); *Mojica v. Reno*, 970 F.Supp. 130, 157-63 (E.D.N.Y. 1997)(Weinstein, J.)(AEDPA provisions amending §§2254 & 2255 do not constitute a repeal of §2241; "[r]epeals by implication are not favored").

In *Triestman*, the Second Circuit held that a federal prisoner raising a colorable *Bailey* claim could bring his habeas petition via the traditional remedy of §2241 where he was otherwise precluded under the AEDPA from filing a successive petition for post-conviction relief. Finding that the recent amendments to §2255 rendered it inadequate and ineffective in that case to test the legality of Triestman's detention, the court determined that the alternative remedy under §2241 remained unimpaired by Congress' handiwork -- a conclusion this Court earlier underscored in *Felker*.

Of particular relevance here, the Second Circuit also determined that filing a habeas claim under §2241 would not constitute a successive petition where Triestman's earlier petitions all had been filed under §2255. *Triestman*, 124 F.3d at 373 n.17. *See also Chambers v. United States*, 106 F.3d 472, 475 (2d Cir. 1997)("Because Sections 2255 and 2241 address different types of claims, filing a Section 2255 motion after filing a Section 2241 motion does not trigger the gatekeeping provisions of Section 2244").

So, too, it is here. Respondent's *Ford* claim goes not to the validity of his conviction and sentence but addresses only the collateral manner of the administration of his execution. Respondent is thus entitled to litigate the validity of this independent federal claim under §2241, notwithstanding that the gatekeeping provisions of §2244 may preclude him from seeking federal relief under §2254. Clearly, in the absence of Congressional repeal of §2241, that two hundred year old statute retains its vitality by which to assert federal jurisdiction over habeas claims latterly rendered unavailable under the AEDPA.

III

THIS COURT LACKS JURISDICTION TO ENTERTAIN THE STATE'S CLAIMS EITHER BY CERTIORARI OR EXTRAORDINARY WRIT

The State candidly concedes (Pet. Br. Point III), as it must, that it is precluded from seeking certiorari in this Court by virtue of §2244(b)(3)(E), which provides that "[t]he grant or denial" of leave to file a successive petition "shall not be the subject of a petition for rehearing or for a writ of certiorari". As this Court noted in *Felker*, "[t]he Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." 116 S.Ct. at 2339. Indeed, the very language of the statute ("grant or denial") indicates Congress' unmistakable intention to exclude prosecutors, as well as prisoners, from appealing court of appeals' certification decisions.

In *Felker*, this Court noted that while it was precluded from entertaining certiorari petitions, it nonetheless retained the authority to hear habeas petitions filed as original matters in the Court. 116 S.Ct. at 2338-39. This, of course, is of no avail to the State as it is only the prisoner -- and not the prosecutor -- who may seek an original writ of habeas corpus from the Supreme Court, and even then only under extraordinary circumstances. *See, e.g.*, Robert L. Stern *et al.*, *Supreme Court Practice* §11.3 at 501-04 (7th ed. 1993); 2 Liebman & Hertz, Ch. 40 (and authorities collected therein).

That leaves review by means of extraordinary writ under the All Writs Act (28 U.S.C. §1651(a)) in the nature of mandamus, prohibition, certiorari or habeas corpus. With certiorari and habeas corpus unavailing, the State is left with

mandamus or prohibition -- neither of which provides a proper jurisdictional basis upon which to invoke this Court's appellate jurisdiction.

This Court has reiterated that the writs "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes" in which "appeal is a clearly inadequate remedy". *Ex Parte Fahy*, 332 U.S. 258, 259, 260 (1947). "The power to issue [the writ] is discretionary and it is sparingly exercised". *Parr v. United States*, 351 U.S. 513, 520 (1956). "Courts faced with petitions for peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n.6 (1967); *Will v. Calvert Fire ins. Co.*, 437 U.S. 655, 665-66 n.7 (1978).

Here, of course, the State attempts an end-run around this jurisdictional barrier. It asserts that since the lower court neither "granted" nor "denied" respondent's certification application -- it simply remanded the case to the district court *simpliciter* -- §2244(b)(3)(E) is somehow inapplicable and ordinary certiorari should apply. In addition to exalting form over substance, the State actually seeks precisely the sort of disfavored interlocutory review of a patently nonappealable order that this Court has repeatedly held to be beyond the authority of the extraordinary writs. *See, e.g., Bankers Life Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roberts v. U.S. District Court*, 339 U.S. 844, 845 (1950).

In this case, the court of appeals has remanded the proceedings to the district court for plenary merits review of respondent's *Ford* claim. Either party aggrieved by the district court's ultimate merits determination will at that time have the customary opportunity for plenary appellate review (28 U.S.C.

§§1291 & 2253) as well as the right thereupon to seek certiorari review in this Court (28 U.S.C. §1254(1)). Accordingly, the issuance of an extraordinary writ at this interlocutory stage of the litigation is wholly unwarranted where there is little likelihood that this Court will ultimately be deprived of its customary appellate jurisdiction over final orders at the conclusion of merits adjudication at *nisi prius*. Certiorari should therefore be dismissed in this case for want of jurisdiction.

Conclusion

The judgment of the court of appeals should be affirmed; alternatively, certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

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Dated: January 1998

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

No. 97-300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY STEWART, Director, Arizona Department of Corrections, et al., *Petitioners,*

v.

RAMON MARTINEZ-VILLAREAL, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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IN THE

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OCTOBER TERM, 1997

No. 97-300

TERRY STEWART, Director, Arizona Department of Corrections, et al., *Petitioners,*

v.

RAMON MARTINEZ-VILLAREAL, *Respondent.*

INTEREST OF AMICUS CURIAE

The American Bar Association ("ABA") submits this brief as amicus curiae[1] pursuant to Rule 37.3 of the Rules of the Supreme Court, to provide the Court its perspective regarding this case. The ABA[2] is a voluntary, national membership organization of the legal profession. Its more than 392,000 members, from each state and territory, and the District of Columbia, include prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and

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[1] Rule 37.3 Statement: All parties have given written consent to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

corrections personnel, law students and a number of "non-lawyer" associates in allied fields.

The ABA is dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const. art. 1, § 1.2. During the past two decades, that dedication has led the ABA to make habeas corpus one of its priorities. In 1982, the Association adopted a comprehensive policy urging specific reforms in federal and state postconviction procedures. In 1983 and 1991, the ABA provided testimony and written materials to both Houses of Congress considering reform of the habeas corpus statutes.

The ABA has been concerned particularly with the administration of justice in habeas corpus proceedings brought by prisoners sentenced to death in state courts. In 1989, under a grant from the State Justice Institute, an ABA task force conducted an intensive study of death penalty habeas corpus reform. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement which urged legislative reform of habeas corpus procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many postconviction petitions raise in capital cases. The ABA is keenly aware of the need for reform of habeas corpus procedures, and has worked hard during the past two decades to achieve that reform. The ABA, however, has never advocated reform at the expense of justice.

SUMMARY OF ARGUMENT

Reform at the expense of justice is precisely what Petitioners and their amici would have this Court believe was the central purpose behind Congress passing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,

1996 U.S.C.C.A.N. (110 Stat.) 1214 ("AEDPA"). Petitioners and their amici argue that Congress intended that the AEDPA forever bar a state prisoner from bringing a properly preserved and presented Eighth Amendment competency claim before a federal habeas court. Petitioners come to this irrational result by ignoring, and asking this Court to ignore, cardinal rules of statutory construction that this Court has long applied. Furthermore, Petitioners' argument requires this Court to conclude that Congress, breaking with two hundred years of history, has for the first time decided to revoke a prisoner's right to have a federal court hear a federal constitutional claim, and has done so in a most ambiguous manner.

Since the birth of our nation, Congress and this Court always have guaranteed prisoners at least one opportunity to raise, in a federal court, all federal constitutional challenges to their incarceration. That opportunity, whether technically styled as writ of error, removal, or habeas review, always has been a matter of right and not simply a matter of discretionary review. Neither the text nor the legislative history of the AEDPA provide the clear evidence necessary for this Court to determine that Congress has now decided to break with this heritage.

The interpretation of the statute advocated by Petitioners is also inconsistent with the text and central purpose of the AEDPA. Section 2244 was designed and drafted to require that prisoners bring all of their claims in a single habeas petition, lest prisoners "abuse" the right to habeas corpus by holding back claims for successive petitions, or by simply filing redundant petitions. Here, Respondent did precisely what he was supposed to do: he bundled all his claims into a single petition. Having persuaded the lower courts that Respondent's competency claim was premature, it is Petitioners who seek to abuse habeas law by reading it, against two hundred years of

tradition, to bar federal review of a properly preserved and presented constitutional claim.

Simply put, reading the AEDPA to bar a federal court from determining a properly preserved and presented constitutional competency claim leads to an "absurd" result. As this Court has consistently held, a statute should never be so interpreted.

ARGUMENT

I. THIS COURT SHOULD CONCLUDE THAT SECTION 2244 CANNOT RATIONALLY BE INTERPRETED TO BAR PROPERLY PRESERVED CLAIMS THAT WERE RAISED BUT NOT DETERMINED IN A PRIOR HABEAS APPLICATION.

A. Reading Section 2244 To Bar Claims That Were Raised In A Prior Habeas Application But Deferred As Premature Would Be Irrational And Would Thwart The Purpose Of The AEDPA.

Section 2244(b)(1), which requires that claims "presented in a prior application" be dismissed, cannot be construed to bar claims that a federal habeas court expressly declined to hear on prematurity grounds in the proceedings upon the prior application. Rather, that section must refer to claims that actually were "presented" -- that is, raised *and determined* -- in a prior application.[3] Otherwise, the central purpose of Section 2244, which Petitioners concede is to give applicants "one bite at the apple" of federal habeas relief (Petitioners' Br.

[3] A claim that was not properly preserved in the state courts, however, is procedurally defaulted and may not be "presented," in the language of the AEDPA, even in an applicant's original habeas corpus application. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991).

at 12), is thwarted. Section 2244 simply cannot rationally be interpreted to apply to claims that a habeas applicant properly presented in state court, and timely raised in his earlier habeas application, but that the habeas court, at the behest of Petitioners, refused to determine.

The fact that Section 2244 concerns claims that actually were heard and determined in a prior habeas application is demonstrated by the Section's title: "Finality of determination." The thrust of Section 2244(b)(1) is to assure that a federal "determination" of habeas claims is final. A properly preserved claim is determined when it has been adjudicated on the merits.[4] There has never been any such "determination" here; rather, the lower courts concluded that one of Respondent's properly preserved and presented claims should be deferred to a later time.

Section 2244(b)(2) compels applicants to bundle their habeas claims together for a single federal "determination." That is precisely what Respondent did. Specifically, Respondent included his competency claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), with his other habeas claims and submitted them all to the federal district court in his earlier habeas application. Petitioners, however, argued that the *Ford* competency claim was "premature" and urged the district court *not* to determine it: "To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 n.1 (9th Cir. 1997) (quoting Petitioners' Reply to Response to Motion for Summary Judgment). The district court accepted Petitioners'

[4] The "determination" to which Section 2244 accords "finality" as to a claim that was not properly preserved in state court is the determination that the claim is procedurally defaulted. *See* n.3 at p.4 above.

argument, holding that the competency claim was "premature." The court of appeals affirmed, and expressly "declined to address [Respondent's] competency claim because it was premature." *Id.* at 630. The court of appeals left no doubt that it was reserving determination of the competency question for a later proceeding:

> To eliminate any ambiguity, we reiterate that the claim of [Respondent's] current incompetence was denied as premature by the district court. . . . Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question.

Martinez-Villareal v. Lewis, 80 F.3d 1301, 1309 n.1 (9th Cir. 1996).

Having successfully persuaded the district court and the court of appeals not to determine Respondent's competency claim until his execution was scheduled because that claim supposedly was "premature," Petitioners now urge that Section 2244 be interpreted to bar the competency claim forever, though a federal habeas court has never determined that properly preserved claim. Petitioners thus urge an interpretation of Section 2244 that would force Respondent to pay with his life for having sought to raise his *Ford* claim at all possible times because, in doing so, he acted both too early *and* too late. That interpretation of Section 2244 is simply "unfathomable." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (holding that regardless of text of Federal Rule of Evidence, language could not be read to engender an irrational result). It "produces an absurd, and perhaps unconstitutional, result" that

"cannot rationally" be accepted. *Id.* at 527-28 (Scalia, J., concurring in judgment).[5]

This Court has long recognized that it should avoid reading a statute in a manner that produces an absurd result. *See Rowland v. California Men's Colony*, 506 U.S. 194, 200 n.3 (1993). Were this the only possible "plain language" interpretation of Section 2244, this Court would be called upon to interpret and qualify that Section's language in a way that "does least violence to the text." *Green*, 490 U.S. at 529 (Scalia, J., concurring in judgment). Here, however, this Court does not have to engage in reading the language in a manner that "does least violence to the text" because there is a reasonable interpretation of Section 2244(b)(1) that avoids any absurdity and does *no* violence to the text (see Section I.B below) -- that is, to read that section to bar only those properly preserved claims that were raised *and determined* in a prior federal habeas application.

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[5] The absurdity of this position is highlighted by the fact that its closest parallel is found not in the annals of our own government, but in that of fictional Fredonia, where newly appointed leader Rufus T. Firefly opened his first Cabinet meeting with the following exchange:

> Firefly: Hello members of the cabinet. We'll take up old business.
> Deputy: (Raises hand and stands) I wish to discuss the tariff.
> Firefly: Sit down. That's new business.
> Deputy: (Sits).
> Firefly: (Looks around the table. No one raises a hand.) No old business? Very well. Then we take up new business.
> Deputy: (Stands) Now about that tariff . . .
> Firefly: Too late! That's old business already. Sit down.

"Duck Soup" (© Paramount Pictures, Inc. 1933).

A contrary reading would mean that, whenever a federal court dismisses a habeas application raising premature or unexhausted claims, those claims would be barred forever. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) ("[A] district court must dismiss habeas petitions containing both unexhausted and exhausted claims."). Yet Congress implicitly has directed the contrary result in Section 2254(b)(2). After codifying the exhaustion rule in Section 2254(b)(1), Congress states that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). By using the word "may," Congress authorized dismissal for failure to exhaust -- as opposed to "denial on the merits" -- with the clear expectation that the dismissed applicant later will file a subsequent application containing the newly exhausted claims that did not warrant being "denied on the merits" in their unexhausted state. This subsequent application, though numerically a second application, could not be a "second or successive" application barred by Section 2244(b)(1). If Section 2244(b)(1) were read, as Petitioners urge, to bar all subsequent claims, then Section 2254(b)(2) would be surplusage since there could be no such subsequent application. This reading would conflict with the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

B. Congress's Use Of The Term "Second Or Successive," Which This Court And The Habeas Corpus Rules Have Defined, Reflects The Intention That Previously Undetermined Claims Not Be Barred.

The term "second or successive" did not come to the AEDPA devoid of history or prior meaning in the habeas

context. Both Habeas Corpus Rule 9(b) and previous case law defined "second or successive." This Court has noted that the term "successive petition" has developed a "distinct meaning." *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986) (plurality opinion). Specifically, a "successive petition" is one that "raises grounds identical to those raised *and rejected on the merits* on a prior petition." *Id.* (emphasis added); *see also McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (quoting Habeas Corpus Rule 9(b)). In passing the AEDPA, Congress was no doubt aware of the meaning of "successive" in the context of habeas proceedings. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (relying on prior judicial interpretation of statutory language in Title VI to inform interpretation of Title IX).

When Congress passed the AEDPA, it took into account possible conflicts with codified Rules, and it amended Rules inconsistent with the new law to make them consistent with the AEDPA. For example, before the enactment of the AEDPA, Federal Rule of Appellate Procedure 22 read:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of probable cause.

On the same day Congress enacted the AEDPA, it amended Rule 22 so that it would read consistently with the certification requirements in the AEDPA. Rule 22 now requires judges to issue certificates of appealability pursuant to amended 28 U.S.C. § 2253. Fed. R. App. P. 22 (amended 1996).

Congress did not, however, amend Habeas Corpus Rule 9(b), which before and after the enactment of the AEDPA read:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief *and the prior determination was on the merits* or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Habeas Corpus Rule 9(b) (emphasis added). Congress thus left Rule 9(b) intact, finding it consistent with the AEDPA. The only reasonable conclusion is that Congress intended the courts to continue treating some subsequent petitions as if, legally, they were first petitions because their properly preserved claims, although presented in an earlier petition, were not then "determin[ed] . . . on the merits . . . ." Habeas Corpus Rule 9(b). If Congress thought that Habeas Corpus Rule 9(b) was inconsistent with the AEDPA, it would have amended that Rule, as it did with Federal Rule of Appellate Procedure 22.

In the absence of a specific definition in Section 2244, this Court should look to the fact that Congress left intact the Rule 9(b) language defining a successive petition as one that was previously *determined on the merits*. Nothing in the text or legislative history of the AEDPA indicates that Congress intended to alter this distinct meaning of the term. This Court has said that "[w]here Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and *judicial meaning*." *Toxaway Hotel Co. v. Smathers & Co.*, 216 U.S. 439, 439 (1910) (emphasis added); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992) (applying same rule where Congress re-enacts a statute after this Court has interpreted the language of the former provision).

Based upon this well-established meaning of "second or successive" petition, the courts of appeals uniformly have held that Section 2244 does not apply to habeas applications asserting claims that were raised in a prior application but were dismissed as unexhausted or for failure to comply with filing requirements. *See Dickenson v. Maine*, 101 F.3d 791, 791 (1st Cir. 1996) (exhaustion); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (2d Cir. 1996) (exhaustion); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997) (exhaustion); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) (exhaustion); *Benton v. Washington*, 106 F.3d 162, 165 (7th Cir. 1996) (filing requirements); *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1997) (exhaustion). The same result must apply to claims that were dismissed as premature. Section 2244 -- the Section entitled "Finality of determination" -- simply cannot reasonably be interpreted to apply to properly preserved claims that were never *determined*.

Petitioners' arguments rest on the notion that Congress impliedly redefined "successive" so that it no longer retains its prior meaning. Before the enactment of the AEDPA, Section 2244(b) read:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law . . . a subsequent application for a writ of habeas corpus . . . need not be entertained by a court of the United States . . . .

28 U.S.C. § 2244(b) (1966). Petitioners point out that the AEDPA no longer includes the phrase "on the merits," and incorrectly conclude that the world of "successive petitions" is now divisible into just two categories: (1) claims that were previously presented, regardless of whether or how they were determined in the prior petition; and (2) claims that were not

presented, but fall into one of the specified exceptions. (Petitioners' Br. at 10-11).

Petitioners' literal reading is incorrect. Courts have recognized that:

> It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). This Court in proposing and later in interpreting Rule 9(b), and Congress in confirming and adopting that provision and then in repeating its language in amended Section 2244(b), have clearly revealed the "purpose or object" of Section 2244(b): to give habeas corpus applicants one, and only one, shot at a federal judicial determination of their properly preserved constitutional claims. Removing the words "on the merits" does not suggest an intent to redefine the phrase "second or successive" but rather to preserve the term-of-art meaning. Thus, if a claim raised in a prior habeas petition is rejected on procedural default grounds, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991), the claim has not been denied "on the merits" but it *has* been "determined" previously.[6] Accordingly, any attempt to present the claim in a later habeas application would be "successive" as the term of art is used in Rule 9(b) and the amended Section 2244(b) -- although not necessarily under a "plain meaning" interpretation of the "on the merits" language that Congress deleted from the prior Section 2244(b).

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[6] *See* n.4 at p.5 above.

C. This Court Should Interpret Section 2244 So As To Avoid A Needless Constitutional Inquiry.

This Court long has recognized that:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932). Chief Justice Marshall first stated that prudential rule of statutory construction in his "opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and [it] has for so long been applied by this Court that it is beyond debate." *Debartolo Corp. v. Florida Gulf Coast*, 485 U.S. 568, 575 (1988). It remains effective today. *E.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

If the court of appeals below had read Section 2244 to bar Respondent's competency claim, it would have opened a Pandora's box of constitutional issues -- to some, but not all, of which Petitioners and their amici devote numerous pages of complex and arduous analysis. The court of appeals recognized that there were "strong indications that under these narrow circumstances [when a claim will always be premature on a first petition], the new statute poses a serious constitutional problem." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 632 (9th Cir. 1997). Specifically, the court of appeals would have had to address if barring a prisoner's ability to have his competency claim heard in federal court constituted a suspension of the writ of habeas corpus in violation of the United States Constitution. The court of appeals prudently, and properly, avoided such a complex inquiry.

Similarly, this Court previously has construed the habeas statute to avoid addressing the relatively uncharted territory of the Suspension Clause of the United States Constitution. *See* U.S. Const. art. I, § 9, cl. 2. Confronting the propriety of changes to Section 2244 concerning successive petitions in *Sanders v. United States*, 373 U.S. 1, 11-12 (1963), the Court warned that "if construed to derogate from the traditional liberality of the writ of habeas corpus, . . . § 2244 might raise serious constitutional questions." By reading the new Section 2244(b) to permit habeas courts to consider the "ends of justice," however, the Court averted a constitutional question. Similarly, in *United States v. Hayman*, 342 U.S. 205, 223 (1952), the Respondent argued that the new Section 2255 might violate the Suspension Clause.[7] The Court avoided the question by noting that Section 2255 preserved the traditional writ as a backstop.

Unless a constitutional construction of Section 2244(b) is "plainly contrary to the intent of Congress," this Court again should construe that statute to avoid constitutional problems.[8]

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[7] The influential argument that the Suspension Clause mandates access to habeas corpus in the federal courts is found in the Brief of Paul A. Freund, Counsel for Respondent in *Hayman* at 29: "[H]aving established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise, Article 1, section 9 would be reduced to a dead letter."

[8] In signing the AEDPA into law, President Clinton, concerned about the constitutionality of another provision in the AEDPA, specifically relied on the federal courts continuing their practice of construing a statute to avoid a needless constitutional problem:

> I expect that the [federal] courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section 104 [of the AEDPA] to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.

President's Signing Statement, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996), *reprinted in* 1996 U.S.C.C.A.N. 961-3.

Debartolo Corp., 485 U.S. at 575, citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979). Such a construction would not be "plainly contrary to the intent of Congress" in this case. *Id.* The purpose of the AEDPA is "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-518 at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. As this Court has stressed, "[t]he new restrictions on successive habeas petitions constitute a modified res judicata rule, a restraint on what is called in habeas practice 'abuse of the writ.'" *Felker v. Turpin*, 116 S. Ct. 2333, 2340 (1996). "Abuse of the writ" occurs when a petitioner deliberately or inexcusably withholds available grounds in a first application for collateral review and then attempts to raise them later. *Sanders*, 373 U.S. at 18.

Respondent in this instance has not abused the writ of habeas corpus: he has not caused unnecessary delay and is not seeking repetitious review of a claim that a habeas court already has determined. Respondent filed his competency claim with his other claims in his earlier federal habeas petition as Section 2244 mandated. Petitioners persuaded the lower court that the competency claim was not yet ripe for determination. That being the case, the court of appeals correctly determined that the AEDPA does not bar this claim now that it is fully ripe.

II. THIS COURT SHOULD NOT READ THE AEDPA TO PRECLUDE HABEAS REVIEW OF A *FORD* CLAIM BECAUSE CONGRESS ALWAYS HAS GRANTED FEDERAL REVIEW AS OF RIGHT FOR DETERMINATION OF FEDERAL RIGHTS AND CONGRESS DID NOT CLEARLY REVOKE THAT RIGHT IN THE AEDPA.

Since 1789, Congress's mandate concerning federal protection of federal rights has been unequivocal. For every federal constitutional right available to persons incarcerated pursuant to federal or state authority, Congress has insisted upon a full, meaningful remedy in federal court for violations of that right. Whether technically styled as writ of error, removal, or habeas review, Congress has always provided the right of access to a federal forum for any prisoner with a federal constitutional claim. *See Whitten v. Tomlinson*, 160 U.S. 231, 238-39 (1895) (discussing the interchangeability of these three methods of review).

Congressional action "inform[s]" this Court's interpretation of habeas review. *See Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996) (noting that congressional legislation "inform[s]" Court's consideration of original habeas petitions). Two hundred years of congressional action indicate that Congress has always provided for federal review as of right for federal constitutional claims. At times when Congress was particularly concerned with the effectiveness of state review of these claims, Congress even provided state prisoners *multiple* avenues of federal review as of right. Nothing in the AEDPA or its legislative history indicates that Congress, for the first time in this nation's history, has now decided to deny a prisoner the right to have a federal court hear his federal claim. Given the historical role of federal review, this Court should not now interpret the AEDPA to revoke impliedly

Respondent's right to bring his properly preserved and presented Eighth Amendment claim in federal court.

Federal review as of right for federal constitutional claims has existed continuously since the founding of this nation. One of the earliest acts of the First Congress created the federal judiciary and delineated some of the rights of persons in custody pursuant to federal or state authority. *See* Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. In the 1789 Act, Congress established two avenues for federal review of federal claims. First, Section 14 of the Act created a federal habeas corpus remedy for violations of constitutional rights and made that remedy available to all prisoners "in custody, under or by colour of the authority of the United States." *Id.*; *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (discussing congressional "obligation" to create habeas jurisdiction in the federal courts). Although the habeas corpus powers of federal courts as codified in the 1789 Act extended only to federal prisoners, so too did the Bill of Rights and other federal protections. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Peters) 243 (1833). State prisoners simply had few federal rights needing federal protection.

The second avenue, however, did provide state prisoners with federal judicial protection. In Section 25 of the 1789 Act, Congress extended writs of error *as of right* to state prisoners who were denied relief "in the highest court of law . . . of a State in which a decision in the suit could be had" on claims challenging a state statute or other state authority "on the ground of [its] being repugnant to the constitution, treaties or laws of the United States" or questioning "the construction of . . . the constitution, . . . a treaty, [or] statute . . . of the United States." *See* Judiciary Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86. Writ of error jurisdiction afforded this Court an opportunity to review *de novo* legal claims of state prisoners

based on federal rights. *See Cohens v. Virginia*, 19 U.S. 264, 414-15 (1821). Unlike modern certiorari, writ of error was a matter *of right*, not of this Court's exercise of discretion. *See* Judiciary Act of Sept. 24, 1789, ch. 20 , § 25, 1 Stat. 73, 85-86; 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 39-40 (2d ed. 1994).

In the first half of the 19th century, Congress began affording substantive rights to certain classes of persons incarcerated by the states. In each instance, Congress accompanied its grant of rights with a coextensive federal remedy for violations of those rights. Furthermore, Congress was specifically concerned that the method of federal review provided would be effective in safeguarding the newly granted rights. For example, Congress determined that certain states, intent on interfering with federal officers acting pursuant to federal authority, could effectively evade writ of error review by employing protracted pretrial confinement. *See* 1 *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 40. Thus, in 1833 Congress empowered federal courts to entertain habeas petitions from state prisoners, or to exercise removal jurisdiction over state prisoners, who claimed to have acted under federal law. *See* Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634. At the time, there was no doubt that federal authorization could have been raised as a defense to any prosecution in state court. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Nevertheless, Congress obligated federal courts in habeas proceedings to re-examine those federal defenses.

State interference with national interests again prompted Congress to act when, in 1842, it extended federal rights to another class of persons in state custody, this time foreign nationals held on account of an act claimed to have been done under color of foreign authority. *See* Act of Aug. 29, 1842, ch.

257, 5 Stat. 539. Congress again legislated enforcement of those federal rights by authorizing federal courts to grant writs of habeas corpus to state prisoners protected by the Act. *See In re Neagle*, 135 U.S. 1, 71-72, 74 (1890).

The Civil War revolutionized the relationship between the states and the federal government. One manifestation of that change was an expansion of federal civil rights and their application in state proceedings. And as federal rights grew, so too did the habeas corpus remedy and other forms of federal review designed to protect those rights in federal courts if state courts did not protect them. Congress, fearing that "recalcitrant local authorities" would fail to enforce newly created federal rights, addressed the situation by expanding all three avenues of federal review as of right. *See* Larry W. Yackle, *Post-Conviction Remedies* § 19, at 86 (1981). The first expansion came when, in 1863, Congress expanded removal jurisdiction and authorized removal to federal court, either pre-judgment or post-judgment, of any claim arising under the Constitution, laws or treaties of the United States. Habeas Corpus Act, ch. 81, § 5, 12 Stat. 755, 756-57 (1863). But Congress did not relegate state prisoners to only this avenue of access to federal appellate review.

When the Fourteenth Amendment, together with a number of civil rights statutes, extended federal protections to all state prisoners, the same Congress that passed this amendment immediately gave the federal courts the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. The legislative history of this 1867 Act is sparse but unambiguous. Congress proclaimed its intention to make habeas corpus "a bill of the largest liberty," available to "enforce the liberty of all persons." Cong.

Globe, 39th Cong., 1st Sess. 4151 (1866) (Rep. W. Lawrence). As Senator Trumball succinctly described the relationship between the new Fourteenth Amendment rights and Congress's simultaneous extension of the habeas corpus remedy:

> Now a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have . . . the benefit of the writ . . . [and] recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

Cong. Globe, 39th Cong., 1st Sess. 4229 (1866).

This Court clearly and promptly recognized the scope of federal court power to review state court adjudication of the newly enacted federal rights. One year after passage of the 1867 Act, Justice Chase, speaking for a unanimous Court, explained:

> This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

Ex parte McCardle, 73 U.S. (6 Wall.) 318, 321-22 (1868). Eighteen years later, in *Ex parte Royall*, 117 U.S. 241, 247 (1886), the Court again stated that "[t]he grant . . . of jurisdiction to issue writs of habeas corpus, is in language as broad as could well be employed." *See also id.* at 253 (citing *Ex parte Bridges*, 2 Woods 428 (5th Cir. 1875)).

The same Reconstruction Congress that expanded the habeas corpus remedy also simultaneously expanded writ of

error jurisdiction, affirmatively guaranteeing a federal forum as of right for a state prisoner to air his federal claims. Judiciary Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385. Under the amended standard, the Supreme Court's writ of error jurisdiction was no longer restricted to cases where a federal question error appeared on the "face of the record." *Id.* Through the combination of that expanded writ of error provision, the broadened habeas remedy, and the 1863 removal statute, Congress demonstrated its distrust of the effectiveness of state remedies to guarantee federal rights by "widen[ing] the range of claims cognizable in all three types of proceedings up to Article III's federal-question maximum":

> Through all three modes of review, *Congress sought to assure prisoners of one full opportunity to enforce their newly given national rights in a national court*, whether via expanded writ of error review on appeal in the Supreme Court, or -- lest the state courts' expected systematic resistance negate rights before writ of error remedies matured -- via the extension to *all* prisoners of full-fledged, pre-writ-of-error habeas corpus and removal protections.

1 *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 41, 42-43 (emphasis added).

Following the Reconstruction era, Congress focused on guaranteeing the availability of *at least* one effective avenue of federal review *as of right* for the determination of federal rights. After this Court narrowly construed the post-war federal question removal statutes, the focus shifted to the use of the writ of error as the primary vehicle for federal review. *See Virginia v. Rives*, 100 U.S. 313, 319, 322 (1879). Because the writ of error, unlike modern certiorari, provided review as of right, the federal habeas remedy was de-emphasized during that

period. Beginning in 1885, both Congress and the Court began to scale back on habeas corpus. Congress restored the Supreme Court's appellate habeas jurisdiction in an effort to create uniformity in habeas review by the lower courts. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437; *see also* 1 *Federal Habeas Corpus Practice and Procedure* § 2.4(d), at 46. This Court understood the 1885 Act to identify the Court's own "writ of error from the highest court of the State" as the preferred mode of federal appellate review as of right. *Ex parte Royall*, 117 U.S. 241, 253 (1886). Hence, this Court substituted *de novo* review as of right in the Supreme Court for the exact form of review that lower federal courts would have provided on habeas review. *See Whitten*, 160 U.S. at 238-39 (comparing writ of error, removal, and habeas review).

This Court continued to exercise habeas review, however, whenever writ of error review could not afford an effective remedy. *See, e.g., Pettibone v. Nichols*, 203 U.S. 192, 202 (1906) (interlocutory extradition proceedings); *Felts v. Murphy*, 201 U.S. 123, 128-30 (1906) (petitioner could not afford to pay for transcript necessary to permit exhaustion of state remedies and then writ-of-error remedies); *Storti v. Massachusetts*, 183 U.S. 138, 142-43 (1901) (immediate review necessary because of impending execution).

By the beginning of this century, the practical difficulties inherent in placing before this Court all federal review for the growing nation led to the erosion of the writ of error. In 1914, Congress acknowledged the growing ineffectiveness of writ of error review by enacting the first in a series of laws that would replace this Court's *mandatory* writ of error review with *discretionary* certiorari review. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. These developments culminated in the near complete replacement of the writ of error by discretionary certiorari review in 1925. *See* Act of Feb. 13, 1925, ch. 229,

§ 237, 43 Stat. 936, 937. At the same time the writ of error was being replaced, however, this Court re-established the federal habeas remedy as the primary method of federal judicial redress as of right of constitutional violations culminating in incarceration. These changes began in *Frank v. Mangum*, 237 U.S. 309, 329-32 (1915), and *Moore v. Dempsey*, 261 U.S. 86, 90-92 (1923), which recognized the expanded scope now due habeas review in light of the decline of writ of error review. This Court confirmed the changes in *Brown v. Allen*, 344 U.S. 443 (1953), and Congress codified them in full in 1966. *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104 (current version at 28 U.S.C. §§ 2244, 2254); *see, e.g., Herrera v. Collins*, 506 U.S. 390, 403 (1993) (habeas is available to redress "any constitutional violation which had occurred at the first trial"); *McCleskey v. Zant*, 499 U.S. 467, 479 (1991) (habeas is available to resolve "all dispositive constitutional claims presented in a proper procedural manner"); *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (discussing the "broad scope of constitutional issues cognizable on habeas"); *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (stating that "a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game [for] federal habeas [review]"). Taken together, therefore, review on writ of error, removal, and/or habeas corpus -- from 1789 to the present -- has consistently assured *state* as well as federal prisoners of at least *one* opportunity for federal judicial review *as of right* of *all* properly preserved constitutional challenges to their incarceration.

In the present case, Petitioners and their amici have argued that this Court must answer the question whether habeas corpus has expanded substantially over the course of American history. The question, by its very nature, is both erroneous and irrelevant to the case at bar. The appropriate inquiry is whether the reach and scope of federal court review as of right of the

legality of custody under constitutional law has expanded. The answer is that it has *not*. From the adoption of the Judiciary Act of 1789 until today, Congress has authorized, and federal courts have provided, federal review *as of right* of fundamental federal questions raised by the government's -- or a state's -- decision to incarcerate an individual. By doing so, Congress has firmly established the principle that a prisoner will be afforded access to federal review as of right to air his constitutional claims.

When Congress has followed such an "established principle," this Court has held that it will find that principle abandoned only on "a clear showing that this result was intended." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (Rehnquist, J.); *see also Ex parte Bakelite Corp.*, 279 U.S. 438, 454 (1929) (noting "the propriety in mentioning the fact that Congress always has treated [an institution] as having [a certain] status"). If Congress had intended a "radical departure" from the tradition of providing a federal forum to a state prisoner, Congress "no doubt would have used explicit language to this effect." *Ruckelshaus*, 463 U.S. at 685 n.7.

The text and legislative history of the AEDPA give no indication that Congress ever contemplated that the statute would effectuate this "radical departure." It is inconceivable that, with the passage of the AEDPA, Congress has broken now with two hundred years of history by denying state prisoners access to federal review as of right of a properly preserved and presented federal constitutional claim, and has done so without so much as a whisper.[9] A proper reading of the AEDPA, in

[9] The President, in signing the AEDPA, noted that some had expressed concern that it "could be interpreted in a manner that would undercut meaningful Federal habeas corpus review." President's Signing Statement, 32 Weekly Comp. Pres. Doc. 719 (Apr. 29, 1996), *reprinted in* 1996 U.S.C.C.A.N. 961-2. The President chose to sign the bill into law, however, "confident" that the federal courts would continue to "interpret th[e] provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary." *Id.*

light of the history of federal review, demonstrates that Congress never considered a *Ford* claim to be a "second and successive" petition when it is properly raised in a first habeas petition but procedurally deferred to a later time.

CONCLUSION

The ABA has, for many years, championed the need for reform in the area of habeas corpus review. With the passage of the AEDPA, Congress has acted to address concerns relating to abusive habeas practices, a purpose consistent with two hundred years of history surrounding the writ of habeas corpus. Nothing in the text or legislative history of the AEDPA indicates that Congress intended to deny a prisoner the right to a determination by a federal habeas court of an Eighth Amendment claim properly preserved in state court and raised in a timely and procedurally proper manner on habeas corpus. This reading of the statute, proffered by Petitioners and their amici, runs counter to the unbroken tradition of providing a prisoner with federal review as of right to all federal constitutional claims.

Reading the AEDPA to preclude federal review of Respondent's properly preserved and presented Eighth Amendment claim also would ignore the central purpose of the AEDPA. In keeping with this Court's definition of a "second or successive" application as one which had been, or could have been but was not, raised and "determined" in a federal court, Congress amended Section 2244 to bar a prisoner from bringing repetitive applications that raise grounds that were or

could have been previously addressed and resolved on habeas review. Respondent in this case has never been given the opportunity to raise his competency claim on habeas review, first because Petitioners argued his claim was "premature," and now because Petitioners argue that his claim is "second or successive." This is precisely the kind of "absurd" result that this Court consistently has avoided by reading statutes in a rational manner -- and that Congress has avoided since 1789 by providing for at least one opportunity for federal review as of right of all constitutional challenges to incarceration.

For these reasons, the American Bar Association, as amicus curiae, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: January 9, 1998

(13)

Supreme Court, U.S.
FILED
JAN 9 1998
OFFICE OF THE CLERK

No. 97-300

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Terry Stewart, Director,
Arizona Department of Corrections, et al.,
Petitioners,
vs.
Ramón Martínez-Villareal,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE UNITED MEXICAN STATES; MIGUEL ANGEL GONZALEZ, Legal Advisor of the Secretary of Foreign Relations of Mexico; LUIS CABRERA, Consul General of Mexico in the State of Arizona IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Respondent Ramón Martínez Villareal is a Mexican national, and Mexico, as does every sovereign nation, seeks to protect the rights of its citizens abroad. Mexico does not use capital punishment and opposes its imposition on its citizens by other countries. The propriety of the death penalty, however, is not the focus of this brief. Fundamental fairness is, and the Government of Mexico is deeply concerned that it is being denied to Mr. Martínez.[1]

SUMMARY OF ARGUMENT

Mindful both of Rule 37.1's admonition against needless repetition and of the respect that one sovereign owes another, Mexico does not intend to tell the Supreme Court of the United States how it should answer the more complex questions of statutory construction raised by the parties. Instead, Mexico contrasts the American justice system's treatment of Mr. Martínez (and Mexico) with that accorded the Petitioners. Mr. Martínez ultimately may be executed because of his counsel's failure to comply with the technicalities of American law. This is so fundamentally unfair that Mexico filed its own lawsuit to stop it, but was rebuffed, again because of technicalities. In contrast, Petitioners not only successfully took flatly contradictory positions in the federal district court, but they also succeeded

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[1] This brief has not been authored in whole or in part by counsel for a party, nor has any person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. As required by Supreme Court Rule 37.3(a), Mexico has obtained the written consent of all parties to file this *amicus curiae* brief.

in submitting a petition whose filing is prohibited by the very statute that is the subject of the petition.

This unfairness of treatment is compounded by the inequity of Petitioners' position on the merits. Petitioners' construction of the Antiterrorism and Effective Death Penalty Act ("AEDPA") is contrary to fundamental principles of international law including those imposed by the American Declaration of the Rights and Duties of Man (hereafter the "American Declaration") which is binding upon the United States. The American Declaration requires that every person be given meaningful access to the courts to protect against violations of fundamental constitutional rights. In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court recognized the fundamental constitutional right not to be executed while insane and that a federal forum exists to protect that right. The construction of the AEDPA sought by Petitioners and their *amici* means a *Ford* claim is always too early or too late for federal review. Such a perverse result is outrageous and contravenes the United States' obligations under the American Declaration.

ARGUMENT

Mr. Martínez Has Been Treated Unfairly

Mexico greatly admires the American justice system, which is held up to the rest of the world as a model of due process, and rightly so. That is one reason why Mexico finds the failure of that system in this case so disturbing.

Only one court has ever considered the merits of Mr. Martínez' claims that his death sentence was unconstitutional because his trial counsel was incompetent. That court agreed:

> [T]he Court finds that trial counsel's performance was constitutionally defective at

> this critical stage of the proceedings rendering the result of the sentencing hearing unreliable and most likely, unfair.

Martinez-Villareal v. Lewis, No. CIV-88-296-TUC-RMB (D. Ariz. Oct. 20, 1994) (Appendix A at 3 (opinion excerpts)).

> At sentencing, [trial counsel] Rothstein essentially abandoned his role as Martinez-Villareal's advocate. The errors and omissions of Rothstein contributed to Martinez-Villareal receiving a death sentence.... [T]he Court is convinced that there is a reasonable probability that, but for Rothstein's errors and omissions, the result of the sentencing outcome would have been different.

Id. at A-14. The Ninth Circuit Court of Appeals reversed on procedural bar grounds, holding that the district court was bound by the state court findings that the ineffective assistance of counsel claim was procedurally defaulted because that same lawyer failed to raise his own incompetence in the first state post-conviction proceeding. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir.), *cert. denied sub nom. Martinez-Villareal v. Stewart*, 117 S. Ct. 588 (1996).

Three other judges have expressed their views that executing Mr. Martínez under these circumstances would be unfair. The judge who sentenced him to death testified at Mr. Martínez' clemency hearing that Mr. Martínez should not be executed. That same day two justices of the Arizona Supreme Court made the unprecedented request that the Board of Executive Clemency recommend to the Governor that Mr. Martínez' death sentence be commuted to life in prison:

[T]he evidence makes it clear that Defendant is mildly retarded and seriously mentally ill. He may well have been in that condition at the time of the crime. At the mitigation hearing, his lawyer did not present evidence of his mental condition or problems. In subsequent federal habeas corpus proceedings, the district judge concluded that the failure to present such evidence was ineffective assistance of counsel. This finding was reversed by the Ninth Circuit Court of Appeals, not because it was erroneous, but, the court said, because the issue was precluded because the same lawyer who performed ineffectively failed to raise his own lack of effective representation as a ground for relief.

In short, this is a case that raises serious doubts about the propriety of the death sentence. For that reason, we commend this matter to review by the Board of Executive Clemency and to commutation by the Governor to imprisonment for life, consecutive to all other terms imposed.

Appendix B attached.

The Mexican Government was so appalled that Mr. Martínez could nevertheless be executed under these circumstances and without having been afforded the protection of minimally competent trial counsel that it filed its own lawsuit seeking to stop the execution. That suit asserted violations of international law prohibiting the execution of the mentally retarded and of persons who were denied the assistance of competent counsel as Mr. Martínez undeniably was. The suit, which also asserted violations of

the United States' obligations under the Vienna Convention, was summarily dismissed by the federal district court – not on the merits -- but on sovereign immunity grounds.

On appeal, although a stay of execution was already in place and despite the magnitude of the issues involved, the Ninth Circuit Court of Appeals ordered expedited briefing (11 days), denied oral argument, denied Mexico the opportunity to file a reply brief and limited the briefs to 15 pages. Six days later and without extending the briefing schedule or deadlines, the court asked the parties to address three additional justiciability questions. Four months later, the court affirmed the district court and held that a suit seeking an injunction against a future act – Mr. Martínez' execution – was barred because Mexico was not seeking prospective relief. *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997).

Mexico is not challenging that decision in this brief. We nevertheless mention it here for two reasons. First, it is a further example of the technicalities that are being asserted to allow Arizona to execute a retarded man who is on death row only because of the incompetence of his counsel. Second, it stands in marked contrast to the treatment accorded the State.

When Mr. Martínez filed his first habeas corpus petition, his new lawyers raised the issue of his competency to be executed. The State successfully argued that the claim was premature. Both the federal district court and the Ninth Circuit Court of Appeals indicated that the claim could be pursued when and if an execution was imminent. Upon his next appearance in federal court, the State said it was now too late to raise this claim and was again successful. This kind of legerdemain was too much for the Ninth Circuit and that court properly rejected the absurdity that a *Ford* claim is

always too early or too late for federal review. *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997).

That should have been the end of the matter. The very statute upon which the State relies prohibits review of the Ninth Circuit's decision by way of a writ of certiorari. 28 U.S.C. § 2244(b)(3)(E). Yet, certiorari was granted.

Mexico is hard pressed to understand the technicalities that may send Mr. Martínez to his death. It is even harder to understand why the procedural rules do not apply to the Petitioners' attempts to reverse the one narrow, albeit very important, decision in Mr. Martínez' favor.

Petitioners' Interpretation Of The AEDPA Violates International Law And Basic Principles Of Equity And Fairness

Reversing the Ninth Circuit's decision would violate fundamental principles of international law. Article XVIII of the American Declaration requires meaningful access to the courts:

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

OAS Res. XXX, O.A.S. Rec. OEA/Ser.L/V/I.4 (1945), as revised (1965). The Organization of American States approved the Declaration at the Ninth International Conference of American States in Bogata, Colombia in 1948. The United States is bound by the Declaration by virtue of its

1968 ratification of the OAS Charter as amended by the 1967 Protocol of Buenos Aires.

Executing the insane violates fundamental constitutional rights and "simply offends humanity." *Ford*, 477 U.S. at 409-10. In *Ford*, this Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* As the Court noted, the "bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded 'savage and inhuman.'" *Id.* at 406. The Court then acknowledged the continued vitality of this "ancient and humane limitation." *Id.* at 409:

> [T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today.... Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

Id. at 409-10. This Court then held that Ford was entitled to an evidentiary hearing in federal district court on the question of his competence to be executed. *Id.* at 418.

Ford established that the right not to be executed while insane is a fundamental constitutional protection and proved the need for a federal forum to protect this right. Petitioners' construction of the AEDPA would eliminate that federal forum and eviscerate the ancient substantive right *Ford* recognized. In addition to being grossly inequitable in light of Petitioners' initial position that this claim was

premature, such a construction contravenes the United States' obligations under the American Declaration.

The possibility of a state court competency proceeding does not cure the violation. Under Petitioners' and their *amicis'* construction of the AEDPA, even the complete absence of a competency hearing is beyond review. Thus, there would be no way for the United States to ensure the protection of the fundamental constitutional right not to be executed while insane. The American Declaration forbids such a result.

Reversing the Ninth Circuit's decision would be more disappointing, more appalling, and more outrageous than any of the previous rulings against Mr. Martínez. The constitutionality of the procedural default rules that would allow the execution of a man represented by an incompetent lawyer is premised on the notion that Mr. Martínez at least had one chance (had he perfected his claim) to present his ineffective assistance claim in federal court. Here, by contrast, Mr. Martínez did everything he could to present in federal court his claim of incompetency to be executed. Nevertheless, although executing the insane unquestionably violates the Eighth Amendment and "offends humanity," Petitioners' unduly rigid interpretation of the AEDPA would deprive Mr. Martínez of any chance to obtain federal review and thus protect this constitutional right.

The notion that a *Ford* claim is always too early or too late for federal review is repugnant to fundamental notions of fairness shared by the society of civilized nations and reflected in both the American Declaration and the United States Constitution. It besmirches the system of justice that Mexico and the rest of the world community so greatly admire. Mexico cannot accept such a position and respectfully asks that this Court reject it.

CONCLUSION

The decision of the Ninth Circuit accordingly should be affirmed.

January 1998.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL,	)	No. CIV 86-296 TUC RMB
Petitioner,	)	
vs.	)	**ORDER AND MEMORANDUM OPINION**
SAMUEL A. LEWIS, et al.,	)	
Respondents.	)	

...

B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
(Claims 4.1, 4.2, 4.3 and 4.4)

William Rothstein represented Martinez-Villareal at his arraignment, pretrial proceedings, trial, sentencing, direct appeal to the Arizona Supreme Court, petition for writ of certiorari to the United States Supreme Court, Petitioner's first Rule 32 petition, petition for rehearing, and petition for writ of habeas corpus in United States District Court in addition to seeking stays of execution in various state and federal proceedings. Petitioner was subsequently represented by Carla Ryan, Luis Castillo and Daniel Davis, John Hannah and present counsel, Sean Bruner. Martinez-Villareal now asserts that he was denied effective assistance at all stages of the litigation.

The State contends that these claims are procedurally defaulted or have no constitutional basis as a matter of law.

. . .

1. Ineffective Assistance of Trial Counsel

The inquiry first turns to the issue of the alleged ineffectiveness of William Rothstein. Martinez-Villareal's present counsel asserts that Rothstein's representation was defective at the guilt-innocence phase of the trial (Claim 4.1); the sentencing phase of the trial (Claim 4.2); and the appeal phase (Claim 4.3).

. . .

b. Penalty Phase (Claim 4.2)

Martinez-Villareal contends that Rothstein's representation at sentencing was constitutionally defective and but for that representation, he would not have been given a sentence of death. A capital sentencing proceeding is sufficiently adversarial so that like a trial, counsel's conduct must be reasonably effective in order that the sentence imposed produce a just result. *Strickland*, 466 U.S. at 686-87, 104 S.Ct. 15 2064. Incompetent counsel's failure to present significant mitigating evidence creates a one-sided, non-adversarial sentencing hearing which in turn erodes confidence in the outcome of the case. *See* Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 485 (1984). The reviewing court must not use the benefit of hindsight to challenge what might have been under the circumstances "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The reviewing court must also apply a strong presumption that counsel's behavior fell within

the wide range of reasonable conduct. *Id.* In determining whether defense counsel engaged in a thorough investigation, courts should look to whether counsel investigated the defendant's background, education, employment record, mental and emotional stability, family relationships and religious beliefs. *See, e.g.*, Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323-25 (1983) (discussing investigations appropriate to presenting a prima facie trial for life). With those standards in mind, the Court finds that trial counsel's performance was constitutionally defective at this critical stage of the proceedings rendering the result of the sentencing hearing unreliable and most likely, unfair. *See, Lockhart v. Fretwell*, ____ U.S. ____, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993).

The first evidence of ineffective representation begins with the Presentence Report. On May 5, 1983, Rothstein wrote the probation officer a one-page letter in order that counsel's recommendations could be included in the Presentence Report. The letter states in relevant part:

> We know two people are dead, but we really do not know what actually happened at the Salero Ranch on that date. These people cannot be brought back and obviously, under the statute Ramon must be punished and it will be punishment, pure and simple.
>
> I would recommend to your office and will recommend to the Court on May 20, 1983, that Ramon be given the maximum sentence for the Aycock burglary, the maximum sentence for the Bailey Burglary, life imprisonment without the possibility of parole for twenty-five (25)

years, on each murder count and that they all run concurrently.

Ramon is 38 years old, if you add 25 years on to this, he will be 63 years old when he gets out and his life will, in fact, be over.

Petitioner's Amended Petition, Exhibit 4. This letter is wholly inadequate as it does not present any mitigating circumstances. Instead, through a single sentence Rothstein attempts to plead for mercy by pointing out that Petitioner will lose 25 years of his freedom if he is given a life sentence. There is nothing in Rothstein's letter to "humanize" the defendant, no discussion of his past family life, no showing of cultural deprivation or lack of mental capacity.

Additionally, Rothstein did not prepare Martinez-Villareal for the presentence interview and did not accompany his client to interview. Based on Rothstein's devastating experience with the suppression hearing and Petitioner's confusion between the jurors and the audience, this failure constituted egregious conduct. Fluent in spanish, Rothstein's presence would have ensured that the information given by the Defendant through an interpreter was accurate and presented his client in the best light. It is not surprising that the probation officer found no mitigating circumstances and recommended the death penalty. While Rothstein's conduct might initially be characterized as trial strategy, these facts provide evidence that leaving Martinez-Villareal to face the probation officer alone was certainly not sound legal practice.

Trial counsel's only witness at the mitigation/sentencing hearing was the probation officer. Rothstein's examination was limited to trying to get the

probation officer to agree that petitioner's trial defenses relating to duress constituted mitigation. There was no attack, for instance, on the prejudicial statements made by Lt. Bracamonte found in the Report. This also cannot be dismissed as permissible trial strategy, when the sentencing hearing is viewed in its totality.

Other significant factors of deficient conduct are apparent. Rothstein did not offer evidence respecting Martinez-Villareal's good behavior while awaiting trial. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 1672-73, 90 L.Ed.2d 1 (1986). Rothstein was also ineffective by not anticipating that the sentencing court would find the obvious aggravating factor of "pecuniary gain." The victims' truck was driven from the scene and found in the desert with Martinez-Villareal's fingerprints on the wheel.

Arizona is a mandatory death penalty state. That is, if there is any one aggravating factor found under A.R.S. § 13-703(F), then death is mandatory unless the mitigating factors outweigh the aggravating factors. Trial counsel raised no mitigating factors, other than arguing a plea for mercy and re-arguing the right to a second degree murder instruction, an instruction which had been previously rejected by the judge. By not presenting obvious mitigating factors, the sentencing court was left with no choice but to sentence Martinez-Villareal to death.

Rothstein did not offer mitigating evidence because he failed to investigate possible sources of such evidence. Evidence presented at Martinez-Villareal's habeas hearing and available at the time of sentencing indicates that if Rothstein had investigated Martinez-Villareal's family and psychological background, he could have presented

numerous character witnesses along with a history of psychological disturbance.

Specifically, Rothstein never presented any mitigating evidence regarding Martinez-Villareal's cultural deprivation and primitive upbringing in an impoverished, isolated rural area of Mexico.[1] Present counsel presents the affidavits of Guadalupe Martinez-Villareal and Isidro Martinez-Villareal, Petitioner's sister and brother. This affidavit establishes that Rothstein never contacted them and yet, present counsel was able to do so almost eleven years later. *See*, Supplement to Amended Petition, December 27, 1993. Thus, the family was denied the opportunity to be present and to testify on their brother' s behalf. Rothstein's decision to forego this investigation and avail himself of this helpful testimony was not reasonable.

Additionally, Petitioner's family members could have testified as to his history of mental problems. Dr. Geffen was able to discern that: (1) Martinez-Villareal was not allowed to go to school because he was mentally ill; (2) Petitioner's father did not believe in mental treatment, but his uncle took him to a psychologist in Chihuahua, Mexico who told the family that Martinez-Villareal was mentally ill; and (3) Petitioner has had auditory and visual hallucinations since his youth.

The sentencing hearing was trial counsel's opportunity to show that Martinez-Villareal was worth saving as a human being through the testimony of family members who loved

---

[1] The Court notes that the presentence report contains some information on Petitioner's family background and lack of education. This does not substitute for an attorneys' duty to advocate for his client.

him. *See, e.g., Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992), *cert. denied*, ____U.S. ___, 113 S.Ct. 1363 (1993). The sentencer must not be precluded from giving individualized consideration to any relevant mitigation aspect of the defendant's character or record. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978). The sentencer, however, can only evaluate this information if the defendant presents it. Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 485 (1984). The Court finds that there is a reasonable probability that had the sentencing judge had the benefit of this testimony, Martinez-Villareal would have been given a life sentence.

The most glaring and prejudicial error concerns Rothstein's failure to have Martinez-Villareal's mental health investigated. Arizona recognizes mental incapacity is a mitigating factor when:

> [t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired to constitute a defense to prosecution.

A.R.S. § 13-703(G)(1). Rothstein testified at the habeas hearing that he was familiar with the procedure for obtaining a mental health evaluation, R.T. of June 23, 1994 at 20, but did not know that it could be used as part of a defense strategy. *Id.* at 2. Rothstein testified that throughout the years of his representation, Martinez-Villareal exhibited symptoms of mental illness and did not appear to comprehend what was going on. For example, Martinez-Villareal was fixated on getting his boots back which had been confiscated by police. Corroborating this fact is Lt.

Bracamonte's statements in the Presentence Report and Petitioner's statement at sentencing. Indeed, according to Rothstein, immediately after receiving a sentence of death Martinez-Villareal asked him, "Well, do I get my boots back?" R.T. of June 23, 1994 at 6. Rothstein testified, "After he was sentenced to death, he asked about his boots. I remember that. I'll never forget that as long as I live." *Id.* at 19.[2]

Rothstein also testified, "I do remember something about voices or him seeing somebody that wasn't there, but I don't remember exactly what i[t] was, you know, maybe a family member or somebody, something with voices, but I don't recall specifically what it was." *Id.* at 18. Yet, Rothstein did not seek to have his client evaluated.

Dr. Garcia-Buñuel testified at the habeas hearing as to his conclusions regarding Martinez-Villareal's mental health. Dr. Garcia-Buñuel is the Director of Correctional Psychiatry for the Maricopa County Sheriff's Office through the Maricopa County Health Department. He has had twenty-one years of dealing with psychiatric issues involving inmates. He has done over a thousand competency examinations similar to the one requested of him in this case. Additionally, Dr. Garcia-Buñuel is a Spaniard who was able to conduct his examination of the Petitioner without the need of an interpreter.

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[2] There was also testimony that within a few hours of execution, Martinez-Villareal was more concerned with getting a broken television repaired than he was of his own imminent death. As this event occurred subsequent to the sentencing hearing, it was not considered in reaching today's decision.

From his evaluation of Petitioner, Dr. Garcia-Buñuel discerned the following: Martinez-Villareal was born in an "ejido" in the State of Chihuahua and grew up as a peasant. He was told that he was "loco" by his parents, because he would get mad and hit his head against rocks and walls. Corroborating this fact are the visible scars on his forehead both below and above the hairline.

Dr. Garcia-Buñuel also discovered that Petitioner has heard voices since he was a "chiquito." Petitioner was hospitalized in Chihuahua for about a year where according to Petitioner, an older psychiatrist prescribed medication to get rid of the voices but that it was not effective.

Petitioner has tried to kill himself by slicing his left forearm. Dr. Garcia-Buñuel observed three longitudinal scars in Petitioner's left forearm and opines that people who make faint suicide attempts, slice their veins at the wrist. Longitudinal "slicing" along the veins/arteries as found on Petitioner's arm are serious, lethal suicide attempts.

It is Dr. Garcia-Buñuel's professional opinion that Martinez-Villareal suffers from paranoid schizophrenia and has suffered from this malady since adolescence. Thus, Dr. Garcia-Buñuel concludes that it is reasonable to assume that at the time of the murders, trial and sentencing, Martinez-Villareal was suffering from this illness. What is significant about Dr. Garcia-Buñuel's findings is that with reasonable investigation and a subsequent psychological evaluation, the above information would have also been available to Rothstein to present at the mitigation hearing.

The State's medical experts at the habeas hearing disagreed with Dr. Garcia-Buñuel's conclusions. Instead, they found Petitioner to be malingering and presently

mentally competent. Drs. Gopalan and Brim reach this conclusion based on their impressions of Martinez-Villareal from their contact with him during the course of treatment, from a review of Petitioner's mental health records and from conversations with other DOC personnel.

Dr. Gopalan, a consulting psychiatrist with the DOC, has treated Martinez-Villareal longer than any other DOC doctor. Dr. Gopalan testified that it is his professional opinion that despite showing psychotic symptoms for the past six years, Martinez-Villareal is not schizophrenic. Instead, Dr. Gopalan characterized Martinez-Villareal's aberrant behavior as "culturally-deprived, sensorial-deprived presentations." R.T. June 23, 1994 at 30. In response to whether Petitioner's demeanor at the habeas hearing was evidence of a catatonic type of schizophrenia, Dr. Gopalan stated:

> "it doesn't rule it in or rule it out. I mean, he's just sitting there with his eyes closed with very little affect shown, which should be consistent with a schizophrenic and a catatonic schizophrenic but would also be consistent with several other conditions, too.
>
> * * *
>
> He can be very depressed, not interested in what's going on. He could be not understanding what is going on, or he could be feigning.

Id. at 36. Dr. Gopalan conceded that Martinez-Villareal's lack of sophistication casts "some doubt" on a diagnosis of malingering. *Id.*

Petitioner's medical records reflect that Dr. Gopalan first saw Martinez-Villareal July 24, 1986 when Petitioner reported hearing voices. Exhibit 2B at 247. Dr. Gopalan was not sure whether Petitioner was experiencing auditory hallucinations and wrote in the file "beginning stages of schizophrenic form disorder." *Id.* Martinez-Villareal was prescribed Navane and Artane and stated that he felt better and heard no voices. R.T. June 23, 1994 at 50. Artane is given to control the side effects of the Navane and has no bearing on whether a person hears voices. *Id.* Dr. Gopalan testified that he believed Martinez-Villareal wanted Artane either for its euphoric effect or to give to other inmates and not for the control of any hallucinations.

Dr. Gopalan's diagnosis of malingering is based, in part, on an April, 1990 blood test that showed Martinez-Villareal was not taking the Navane. However, the medical records reflect that on May 14 and 15, 1990, Martinez-Villareal was refusing both the Navane and the Artane. On June 26, 1990, the medical records reflect:

> [Martinez-Villareal] was complaining of auditory and visual hallucinations, hears his name called and sees snakes, has thoughts of cutting himself, verbal contact obtained to not harm himself. . .

Exhibit 2B at 300. At the time, Dr. Gopalan questioned whether this "decompensation" was manipulative because Martinez-Villareal had not been taking his Navane with no complaints. Nonetheless, Dr. Gopalan prescribed Navane but with Cogentin, a drug which does not provide the euphoric effect found in Artane. Subsequent periodic blood tests established that Martinez-Villareal was taking his medication since the Navane levels in his blood were within a therapeutic

range. This course of treatment continued until Martinez-Villareal complained that he felt the medication was no longer effective. He was then prescribed Prolixin-D which is an antipsychotic drug administered intravenously. Dr. Brim discontinued Prolixin-D in November, 1993, based on his opinion that the treatment was of no benefit to Martinez-Villareal. Exhibit 2B at 358. At that same time, the medical records reflect that Dr. Brim characterized Petitioner's behavior as "factitious mental disorder." *Id.* At the habeas hearing, however, Dr. Brim characterized that that diagnosis as a "slip of the pen." R.T. June 23, 1994 at 203. Dr. Brim testified that he should have written "malingering" rather than "factitious mental disorder." *Id.*

While the State's experts and medical records raise questions of whether Martinez-Villareal is feigning his present mental state, it is not conclusive either way as to whether Martinez-Villareal was incompetent at sentencing. His medical records do establish that the treating DOC psychiatrists felt at one time that it was medically appropriate to prescribe Martinez-Villareal antipsychotic drugs.

The Court is well aware that Petitioner's statements to Dr. Garcia-Buñuel could be considered self-serving under normal conditions. It was Dr. Garcia-Buñuel's professional opinion, however, that Martinez-Villareal was being truthful and was not feigning his mental state. According to Dr. Garcia-Buñuel a diagnosis of schizophrenia does not mean that Martinez-Villareal was unaware of the significance of the murders. As discussed previously, that retroactive determination cannot be made. Dr. Garcia-Buñuel was a credible witness with his testimony and conclusions persuasive. Thus, it is this Court's finding that Dr. Garcia-Buñuel's testimony undermines the reliability and fairness of Martinez-Villareal's mitigation hearing. The proper course of

conduct at sentencing should have been to have all of this information available for the sentencing court's consideration.

Of course, it is acceptable trial strategy to choose not to call psychiatrists at sentencing where the experts would be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion. *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). In this case, however, Rothstein made *no* inquiry into Martinez-Villareal's sanity and thus, no tactical evaluation occurred. No risk would have been incurred by presenting evidence of Petitioner's mental capacity. There is no evidence that Rothstein committed these acts as part of a scheme to build in constitutional error. Instead, trial counsel's failure to investigate was a mistake, not a strategic decision. *See* Ronnie Seidel, *Criminal Procedure--Right to Effective Assistance of Counsel at Capital Sentencing -- Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992, *cert. denied*, 113 S.Ct. 1368 (1993), 66 Temp. L. Rev. 1107 (1993). Thus, absent tactical purpose or risk, failure to investigate the defendant's mental state and request a Rule 11 evaluation was ineffective assistance of counsel within the meaning of *Strickland*. *Mak v. Blodgett*, 970 F.2d at 619.

Rothstein admitted at the habeas hearing that if he had presented evidence of Martinez-Villareal's mental problems, it would have made a difference:

> . . . I messed up. I mean I did, you know, and I feel bad about it, and I have for all these years. Because if I had done that and presented -- done more at the sentencing, then I think maybe he would have given him -- he would have probably given him consecutive

terms but he wouldn't have given him the death penalty. That's just my opinion. That's all.

Id. at 11.

At sentencing, Rothstein essentially abandoned his role as Martinez-Villareal's advocate. The errors and omissions of Rothstein contributed to Martinez-Villareal receiving a death sentence. Taking into consideration any evidence the State might have conceivably produced in rebuttal, the Court is convinced that there is a reasonable probability that, but for Rothstein's errors and omissions, the result of the sentencing outcome would have been different. *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988); *Strickland v. Washington*, 104 S.Ct. at 2068. Martinez-Villareal has met both prongs of the *Strickland* test. The Court concludes that the writ must be granted insofar as the penalty phase of death is concerned.3

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[3] Had Rothstein stepped aside and allowed new counsel to assert this challenge at the first state post-conviction proceeding, Martinez-Villareal might have received a new sentencing hearing eight years ago. In capital cases, allowing the trial attorney to represent the defendant at all stages of the litigation especially where mental capacity is in doubt frustrates the legal process and hinders justice.

APPENDIX B

IN THE SUPREME COURT

STATE OF ARIZONA

RAMON MARTINEZ-VILLAREAL,	)	
	)	No. CV 97-0206-SA
Petitioner,	)	
	)	
vs.	)	PINAL County Superior Court
PINAL COUNTY SUPERIOR COURT, HONORALBE BOYD T. JOHNSON, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pinal,	)	No. CR 970-22291
	)	ORDER
Respondents.	)	
STATE OF ARIZONA,	)	
Real Party in Interest.	)	

Petitioner has filed a request for special action relief from the Order of the Superior Court dated May 9, 1997 on the matter of the Petitioner's competency to be executed pursuant to the conviction and death sentence heretofore imposed upon him. The petition has been addressed by the full court.

Having considered the briefs filed on behalf of the Petitioner and the office of the Attorney General, the

arguments and authorities cited therein, the full transcript of the Superior Court proceedings to determine competency held April 7, May 6, May 7, and May 8, 1997, and having independently reviewed the testimony and medical evidence introduced at the hearing, and in light of the findings of the trial court, this court concludes that the trial judge correctly found that Petitioner failed to prove incompetency by clear and convincing evidence or even by the lesser standard requiring proof by a preponderance of the evidence.

IT IS THEREFORE ORDERED accepting jurisdiction of the special action petition herein.

IT IS FURTHER ORDERED denying the relief requested by Petitioner.

IT IS FURTHER ORDERED denying Petitioner's request for stay of execution.

DATED this 16th day of May, 1997.

/s/
CHARLES E. JONES
Vice Chief Justice

Separate statement by Chief Justice Zlaket and Justice Feldman:

We join in the Court's order accepting jurisdiction and denying relief. Defendant has not carried the difficult burden of proving by clear and convincing evidence that he is incompetent to be executed. The definition of incompetence for that purpose is quite narrow. However, the evidence

makes it clear that Defendant is mildly retarded and seriously mentally ill. He may well have been in that condition at the time of the crime. At the mitigation hearing, his lawyer did not present evidence of his mental condition or problems. In subsequent federal habeas corpus proceedings, the district judge concluded that the failure to present such evidence was ineffective assistance of counsel. This finding was reversed by the Ninth Circuit Court of Appeals, not because it was erroneous but, the court said, because the issue was precluded because the same lawyer who performed ineffectively failed to raise his own lack of effective representation as a ground for relief.

In short, this is a case that raises serious doubts about the propriety of the death sentence. For that reason, we commend this matter to review by the Board of Executive Clemency and to commutation by the Governor to imprisonment for life, consecutive to all other terms imposed. We suggest also that the Board and the Governor consider the comments of the district judge who presided at the federal habeas corpus proceedings. A copy of his May 16, 1997 order is attached.

/s/
THOMAS A. ZLAKET, Chief Justice

/s/
STANLEY G. FELDMAN, Justice